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## ORIGINS OF FEDERAL COMMON LAW: PART TWO\*

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Thomas Jefferson wrote Edmund Randolph in August 1799 of the need "to portray at full length the consequences of this new doctrine, that the common law is the law of the US, & that their courts have, of course, jurisdiction co-extensive with that law, that is to say, general over all cases & persons."<sup>1</sup> Closing the letter in the next line, he remarked, "But, great heavens! Who could have conceived in 1789 that within ten years we should have to combat such wind-mills."<sup>2</sup> Somewhat more than a year later, John Marshall commented in a private correspondence:

In political controversy it often happens that the precise opinion of the adversary is not understood, & that we are at much labor to disprove propositions which have never been maintained. A stronger evidence of this cannot I think be given than the manner in which the references to the common law have been treated.<sup>3</sup>

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\* Part One of this essay appears at 133 U. PA. L. REV. 1003 (1985) [hereinafter cited as Jay, *Part One*].

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<sup>1</sup> Letter from Thomas Jefferson to Edmund Randolph (Aug. 23, 1799), *reprinted in* 9 THE WORKS OF THOMAS JEFFERSON 76 (P. Ford ed. 1905).

<sup>2</sup> *Id.* at 76-77.

<sup>3</sup> Letter from John Marshall to St. George Tucker (Nov. 27, 1800), *reprinted in* Appendix A, *infra*.

Marshall added that he did not believe that "one man [could] be found" who maintained "that the common law of England has . . . been adopted as the common law of America by the constitution of the United States."<sup>4</sup> "This strange & absurd doctrine," he continued, "was first attributed to the judiciary of the United States by some frothy newspaper publications which appeared in Richmond something more than twelve months past, but I never suspected that an attempt would be made to represent this as a serious opinion entertained by respectable men . . . ."<sup>5</sup>

Although the roots of the controversy over federal common-law jurisdiction extend far back into American history, its emergence in the public consciousness, at the time Marshall mentioned, came at a moment of exceptional political crisis.<sup>6</sup> In Part One of this essay, we visited the manifestations of the common-law controversy by following the places in the public debate where the common law emerged as an issue and exploring the development of common-law criminal adjudications in federal courts during the decades prior to *United States v. Hudson*.<sup>7</sup> The aim of this half of the essay is to pursue the clashes over federal common law to more fundamental levels. First, the manner in which the common law became embroiled in controversy is traced. We see, for example, why the discussion of common law and federal courts led to Republican charges that a consolidated national government was being foisted upon the country. Second, we untangle the usages of the term "common law." This analysis is undertaken by reconstructing the key features of theories about judicial jurisdiction and the nature of law. In doing so, it becomes apparent that the arguments employed have very little to do with the issues that we now associate with federal common law.

The first two sections concentrate on the central sources of Republican anxiety over the federal courts and the common law and explain

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<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Peter Du Ponceau recalled that the "spirit of hostility" toward "this doctrine of the nationality of the common law . . . began in Virginia in the year 1799 or 1800, in consequence of an opposition to the alien and sedition acts." P. DU PONCEAU, A DISSERTATION ON THE NATURE AND EXTENT OF THE JURISDICTION OF THE COURTS OF THE UNITED STATES 102 (Philadelphia 1824). Speaking in 1801 against continuation of the Sedition Act, ch. 73, 1 Stat. 596 (1798), Representative Nathaniel Macon stated that at the time the Act was initially adopted in 1798, "this common law of the United States, of which we now hear so much, was not talked of." He continued by noting that "[a]t the last session," when a motion to repeal the Act was being entertained, "the law was then supported on this reason, to prevent the operation of the common law, and to afford the gentlemen themselves the liberty of expressing their sentiments . . . ." 10 ANNALS OF CONG. 963 (1801).

<sup>7</sup> 11 U.S. (7 Cranch) 32 (1812).

how the matter crystallized around the question of states' rights. Then, we take up a recent suggestion by Morton Horwitz that the concern over common law had little to do with party politics or states' rights, but instead was largely an issue of separation of powers at the federal level. In rejecting Horwitz's thesis, this essay does not deny the increasing perception among Americans that judges were making law and, hence, should be controlled by the elected branches of government. The contention is that the relationship between the federal government and the states became the primary manifestation of deeper conflicts and that this debate was heavily influenced by partisan confrontations. The recognition of judges as instruments for formulating public policy was more likely a part of the fallout from the clash over states' rights than it was the cause of any revolt against the common law.

These initial sections serve to show why the common-law authority of federal courts was seen by the Republicans as a vital component in their quarrel with Federalists over the national union. From here we proceed to a more basic plane of inquiry directed at the theories of judicial jurisdiction that lay behind the public disputes over states' rights and national consolidation. We examine the framing of article III<sup>8</sup> itself to see if anything in the structure of the text or the attendant debates casts light on what role the common law was to have in the federal courts. Then we approach the first judiciary act, singling out section 34's well-known command to employ state law in federal courts.<sup>9</sup> These two sections are preparatory to a third, which argues that the nature of jurisdictional theory at this time was unreceptive to the development of an understanding of "federal common law" in the modern sense of the term. The reasons for this failure revolve around two themes. One is associated with a prepositivist conception of law as a body of rules and principles subject to discovery that in turn made plausible the idea of "general" common law. The second centers on the notion of sovereignty itself, by which governmental authority was considered to be bound up in a single sovereign with exclusive control over a particular territory. Together these themes complicated immensely the production of a theory of common-law jurisdiction applicable to the national establishment.

Concluding the investigation of jurisdictional theories is a look at what might appear to be the likely alternative to a common-law jurisdiction for federal courts: jurisdiction assigned by Congress. At this juncture we return once again to *Hudson*. We come away from this

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<sup>8</sup> U.S. CONST. art. III.

<sup>9</sup> Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92 (current version at 28 U.S.C. § 1652 (1982)).

discussion with the impression that Justice Johnson, the author of *Hudson*, was saying a great deal about the limitations on Congress's power to authorize federal courts to act like common-law courts. In the end, however, *Hudson* emerges not so much as a resolution of the affair, but rather as a signal of an inability to depict the essential powers of federal courts given the jurisdictional theories then in place.

In the remaining part of the essay, we ask what the relevance of the *Hudson* era might be to our present deliberations about federal common law. Initially this presents the persistent question of the proper use of historiography by the courts. Any time one generation scrutinizes another there is the likelihood of error or simply the invocation of a supposed past to accomplish a current political end. The modern theory of federal common law—to the extent it can be called a unified theory—is often justified as a correct rendition of the essential role that federal courts were initially designed to have. This justification turns out to be wrong merely at the level of faithfulness to history. Moreover, it assumes that the questions asked about the common-law powers of federal courts in the early debates are similar to the ones arising today. That assumption is quite misplaced.

## I. THE GENESIS OF FEDERAL COMMON LAW: AN ANALYTIC ASSESSMENT

### A. *The Various Meanings of "Common Law"*

In reviewing the discussions about common law that took place during the period we have been considering, it is striking how variously the term was used. Especially when the contest among partisans escalated significantly with the Sedition Act prosecutions, Republicans construed their opponents' statements concerning the force of the common law in light of their worst suspicions about Federalist motives. The result was a caricature of their rivals' views, an occurrence not unusual in political exchanges. When Federalists began to claim with some consistency toward the end of the 1790's that "the common law existed under the Constitution of the United States,"<sup>10</sup> or "the common law

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<sup>10</sup> 10 ANNALS OF CONG. 411 (1800) (statement of Rep. Bayard). During the debates on the repeal of the 1801 Judiciary Act, ch. 4, 2 Stat. 89, *repealed by* Act of Mar. 8, 1802, ch. 8, § 1, 2 Stat. 132, 132, Bayard made similar remarks: "[T]he Constitution of the United States was predicated upon an existing common law . . . . [S]tripped of the common law, there would be neither Constitution nor Government." 11 ANNALS OF CONG. 613 (1802). Bayard probably meant no more than that "[t]he Constitution is unintelligible without reference to the common law," *id.*, but Republicans found a sinister intent lurking in such statements.

was the law of this land,"<sup>11</sup> Republicans could point to these broad statements as evidence of a Federalist plan to incorporate the common law, and all that accompanied it, into the new Republic.

The common law became a convoluted symbol in political discourse, whose elasticity was equaled only by the hold it had on the public consciousness due to its association with Britain. Republicans traded on its susceptibility for identification with "the mass of maxims, principles and forms of judicial proceeding"<sup>12</sup> utilized in England. Federalists, on the other hand, were more likely to use it to refer to a mode of reasoning *common* to all court systems of the Anglo-American world. The Federalist judge Alexander Addison wrote, "The common law of England is the foundation of our law. Their language is ours. We use the terms of the English law in the English sense of those terms."<sup>13</sup> The former interpretation invited images of a foreign system imposed on unwilling recipients, and served nicely to show the supposed ambitions of a federal judiciary claiming it as a proper domain of jurisdiction. By emphasizing the common law as a type of principled adjudication, Federalists meant it "as a metaphor for an extensive and reliable system of national justice,"<sup>14</sup> one based on ever-accumulating custom and appropriate to the affairs of the Union. "[T]hat left the problem on as imprecise a footing as the law of nature,"<sup>15</sup> and went over poorly with those anxious for precise delineations of authority.

Although Part One was intended to demonstrate how the assorted faces of the common-law controversy were tied to the emergence of party politics in America, it would be incorrect to assume that the issues and terminology of the debate were determined solely by immediate political advantage. Soon after complaining about the mischaracterization of the Federalist stance on the common law, Marshall wrote to George Washington on the subject of the Alien and Sedition Acts. His mood was pessimistic: "I am firmly persuaded that the tempest has not been raised by them. Its cause lies much deeper & is not easily to be removed. Had they never pass'd, other measures would have been selected which would have been attacked with equal virulence."<sup>16</sup> Mar-

<sup>11</sup> 10 ANNALS OF CONG. 420 (1800) (statement of Rep. Lee).

<sup>12</sup> Eliot, *The Common Law of the Federal Courts*, 36 AM. L. REV. 498, 501 (1902).

<sup>13</sup> Addison, *Analysis of the Report of the Committee of the Virginia Assembly*, in AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA 1760-1805, at 1090 (C. Hyneman & D. Lutz eds. 1983).

<sup>14</sup> L. KERBER, *FEDERALISTS IN DISSENT: IMAGERY AND IDEOLOGY IN JEFFERSONIAN AMERICA* 170 (1970).

<sup>15</sup> 1 J. GOEBEL, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801*, at 655 (1971).

<sup>16</sup> Letter from John Marshall to George Washington (Jan. 8, 1799), *reprinted in*

shall's perception that there were profound underlying differences in the society was penetrating in its accuracy.<sup>17</sup> The Acts and the common law were but the surface manifestations of essential tensions in a society that was defining itself in the midst of what was literally a revolutionary era.

Any society that experiences the rupture of revolution necessarily faces the problems of establishing a new governmental structure. All such societies confront as well the existence of established rules of conduct for public and private affairs. The degree to which these rules are associated with governmental institutions will naturally vary by the culture involved. For Americans of the post-Revolutionary generation, there was scarcely any question that the courts would supply a major portion of the standards for behavior. Nor could there be any doubt that the common law of England, at least as it was seen through colonial eyes, was the reference point for legal analysis. Americans had, after all, expended considerable blood to pursue a rebellion that was in large measure inspired by the invocation of the common law as their "birthright." For instance, John Adams, while Vice President, was said to have risen "from his chair, and emphatically declared to the whole Senate, that if he had ever imagined that the common law had not by the Revolution become the law of the United States under its new government, *he never would have drawn his sword in the contest.*"<sup>18</sup>

Expressions of the sort used by Adams<sup>19</sup> could have a number of connotations. Americans living at the time of the Revolution would have taken the demand for the common law as a reference to the basic principles of personal liberty, a prime example being the right of habeas corpus. They were not thinking of "the vast body of rules regulating the rights of contract and property and the ordinary proceedings

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4 THE PAPERS OF JOHN MARSHALL 3 (C. Cullen ed. 1984).

<sup>17</sup> For discussion about the competing visions of the American union and the role of the state itself, see Jay, *Part One*, at 1024-31.

<sup>18</sup> 1 LIFE AND LETTERS OF JOSEPH STORY 300 (W. Story ed. 1851). This account was related to Joseph Story by Adams' private secretary. For a similar statement, see Jay, *Part One*, at 1078.

<sup>19</sup> This usage was common in the years during and immediately after the Revolution. See, e.g., *Declaration of Rights of the Continental Congress* (1774), reprinted in READINGS ON THE HISTORY AND SYSTEM OF THE COMMON LAW 309 (R. Pound & T. Plucknett eds. 3d ed. 1927):

[T]he respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law.

. . . [T]hey are entitled to the benefit of such of the English statutes as existed at the time of their colonization; and which they have, by experience, respectively found to be applicable to their several local and other circumstances.

in court."<sup>20</sup> Throughout the pre-Revolutionary period there had been significant ambiguity associated with the idea of law. This ambiguity was rooted in a conflict over the extent to which British law applied in the colonies and a fundamental belief that law was nothing more than the "principles of right reason."<sup>21</sup> Principles of natural justice could never be wholly encapsulated in any system of rules: "Laws, grants, and charters merely stated the essentials," and no statement of English law could "wholly exhaust the great treasury of human rights."<sup>22</sup> Through the vague association of the common law with natural justice, revolutionaries were able simultaneously to lambaste the British while regarding their enemies' law "as a palladium of liberty."<sup>23</sup>

In Blackstonian terms, the common law was understood to be a system of customs stretching far back into the English past. Americans were nonetheless fully aware that the incorporation of the British common law had been selective in all the states. That feature was not troublesome by itself. As James Wilson remarked, "the expanding and accommodating genius of the common law" permitted the courts to apply "easily and aptly its maxims and rules . . . in new situations and emergencies."<sup>24</sup> Still, Americans knew that much of the content and procedural formalities of the British common law were kept intact.<sup>25</sup>

<sup>20</sup> Reinsch, *The English Common Law in the Early American Colonies*, in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 384 (E. Freund, W. Mikell & J. Wigmore eds. 1907); accord Pope, *The English Common Law in the United States*, 24 HARV. L. REV. 6, 16 (1910).

<sup>21</sup> G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 295 (1969); accord W. CARPENTER, THE DEVELOPMENT OF AMERICAN POLITICAL THOUGHT 27 (1930).

<sup>22</sup> B. BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 78 (1967). Law, Gordon Wood writes, was "in such a confused and chaotic state that the only criterion for its authority had seemed to be its intrinsic justice . . ." G. WOOD, *supra* note 21, at 296.

<sup>23</sup> Goebel, *The Courts and the Law in Colonial New York*, in ESSAYS IN THE HISTORY OF EARLY AMERICAN LAW 268 (D. Flaherty ed. 1969); accord M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 4 (1977).

<sup>24</sup> Charge to the Grand Jury for the District of Massachusetts (June 7, 1793), reprinted in Federal Gazette (Philadelphia), June 25, 1793.

<sup>25</sup> American courts generally persisted in their adherence to the essentials of the English legal system:

From the established settlements of Massachusetts, New York, and Virginia, to the frontiers of the Indiana and Michigan Territories, it was English law and legal forms that defined American jurisprudence. There may well have been widespread impatience with the technicalities that often made justice expensive and inaccessible, and certainly there were scattered incidents of local resistance to the courts. But the fathers and sons of the American Revolution concentrated on trying to make the old system more responsive, instead of destroying it or creating a more rational system to supersede it, as their counterparts in Napoleonic France did during these years.

For lawyers the intricacies of British law represented "a welcome continuation of the accepted order of things."<sup>26</sup> Courts went on functioning after the Revolution as they had before with few changes of note. The new state constitutions treated the judiciaries incidentally, "as . . . going concern[s]" that "needed no words of creation, let alone a direct and explicit affirmation of [their] existence."<sup>27</sup> Largely this approach was a product of necessity: there were virtually no American case reports available until some years after the Revolution,<sup>28</sup> and "[i]n the first generation, more English than American cases were cited in American reports" that were published.<sup>29</sup>

This persisting reliance on British common law should not have been startling; it would have required real effort and determination to upset the customary ways of resolving human conflicts. To many, however, the dependence on English law was a galling circumstance, all the more so since Americans were in a position to dictate the terms for accepting the common law. Necessity might require a continuation of the understood law and judicial mechanisms, but it was clearly perceived that much of the common law was inconsistent with premises of republicanism. Why should Americans turn to these "ancient British Judges," demanded the fiery Matthew Lyon, "who have derived their greatness and sucked their principles from the very poisonous breast of monarchy itself"?<sup>30</sup>

A large measure of the evident tension over the common law flowed, then, from the dilemma with which the country was confronted. Americans understood, said James Wilson, that the "civil society and government" rested on "the Social Contract [which was] found to be an assemblage of agreements, equal in number to the number of individu-

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M. TACHAU, *FEDERAL COURTS IN THE EARLY REPUBLIC: KENTUCKY 1789-1816*, at 78 (1978) (footnotes omitted). Tachau's exhaustive researches into Kentucky federal court records found that on the whole those courts "were very conservative" and demonstrated "rigorous adherence to the antiquated technicalities of English law." *Id.* at 77.

<sup>26</sup> E. BROWN, *BRITISH STATUTES IN AMERICAN LAW 1776-1836*, at 22 (1964).

<sup>27</sup> 1 *THE LAW PRACTICE OF ALEXANDER HAMILTON* 12 (J. Goebel ed. 1964); see also Morris, *Legalism Versus Revolutionary Doctrine in New England*, in *ESSAYS IN THE HISTORY OF EARLY AMERICAN LAW*, *supra* note 23, at 431-32. Likewise, no sudden "reception" of British law as a foreign body occurred, despite the existence of numerous reception statutes. See Chafee, *Colonial Courts and the Common Law*, in *ESSAYS IN THE HISTORY OF EARLY AMERICAN LAW*, *supra* note 23, at 75-76 (noting no reception in Delaware and doubting that reception occurred in other states).

<sup>28</sup> See E. BROWN, *supra* note 26, at 41; 2 A. CHROUST, *THE RISE OF THE LEGAL PROFESSION IN AMERICA 78-79* (1965).

<sup>29</sup> L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 98 (1973).

<sup>30</sup> A. AUSTIN, *MATTHEW LYON: "NEW MAN" OF THE DEMOCRATIC REVOLUTION, 1749-1822*, at 53 (1981) (quoting Farmers' Library (Fairhaven, Vt.), Aug. 19, 1794).



als who form the society.”<sup>31</sup> By then this was old rhetoric; the novelty was in the application. “[T]he United States, is now put upon an experiment,” Wilson added, and the “important question is . . . are men capable of governing themselves?”<sup>32</sup> Choices had to be made. It hardly behoved the character of republican experimentation to persist with a major social institution such as the common law without serious reflection. Even a casual inquiry, though, revealed the obvious. The common law was not a system set up for revolutionary change. Yet Americans were obliged to live with it if they wanted the advantages of stable expectations—not only for their basic liberties, but also for the foundation of economic life.<sup>33</sup>

While the common law endured as the basis for American law, the country’s passage into the nineteenth century was accompanied by increasing hostility to this state of affairs.<sup>34</sup> Although a complex set of factors contributed to this change in attitude, much of the aversion came simply from a realization of what British common law entailed. Julius Goebel put it well: “The common law as an ideal was devoutly prayed for; the law in fact—a tangle of technicalities—was what the lawyers brought.”<sup>35</sup> Lingering bitterness toward the British, a recognition of the unsuitability of much of English law to America, and the Republicans’ charge that their opponents were trying to introduce elements of the English monarchical system, all combined to make the common law a topic of stormy public exchanges.<sup>36</sup> Some states forbade cita-

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<sup>31</sup> Charge to the Grand Jury for the District of Massachusetts (June 7, 1793), reprinted in *Federal Gazette* (Philadelphia), June 25, 1793.

<sup>32</sup> *Id.*

<sup>33</sup> Vermont, for example, faced the question whether former Loyalists who reacquired lands confiscated during the Revolution should pay for improvements made by those who had taken title during the interim. Lawyers and judges in the state united behind the common law principle that no “betterments” were required for individuals who had obtained titles by confiscation. See A. AUSTIN, *supra* note 30, at 49. Leading the forces in opposition to the legal community, Matthew Lyon decried these “voracious enemies” of the “soldiers and sufferers in the late British war . . . [The lawyers’] books and their rich clients told them that the Common Law of England knew nothing of paying for betterments of labor.” *Id.* at 50 (quoting *Farmers’ Library* (Fairhaven, Vt.), Aug. 19, 1794).

<sup>34</sup> See M. HORWITZ, *supra* note 23, at 11.

<sup>35</sup> Goebel, *supra* note 23, at 270; accord 2 A. CHROUST, *supra* note 28, at 56-57.

<sup>36</sup> See A. HOWARD, *THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA* 260 (1968); L. FRIEDMAN, *supra* note 29, at 94; Pound, *The Place of Judge Story in the Making of American Law*, 48 AM. L. REV. 676, 681-82 (1914). Then, as now, many people simply disliked lawyers: Thomas Paine harangued against the “chicanery of law and lawyers,” L. FRIEDMAN, *supra* note 29, at 94 (quoting *COMPLETE WRITINGS OF THOMAS PAINE* 1003 (P. Foner ed. 1945)); quite a few saw attorneys as “innately depraved and dishonest,” R. ELLIS, *THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC* 176 (1971). A great deal of the hostility reflected “suspicion of, and disrespect for, intellectuals—an

tion of British cases decided after 1776,<sup>37</sup> and even the Supreme Court appeared reluctant to rely on English authorities in the years before Marshall's tenure.<sup>38</sup> James Monroe wrote in 1802 that "the application of the principles of the English common law to our constitution" should be considered "good cause for impeachment."<sup>39</sup> And the Republican *Aurora*, once the target of a state common-law seditious libel prosecution, seethed in 1805 against "the dark, arbitrary, unwritten, incoherent, cruel, inconsistent, and contradictory maxims of the *common law* of England."<sup>40</sup>

The term "common law" took on progressively different meanings as the years passed, and changed according to the needs of the times. When *United States v. Hudson*<sup>41</sup> arrived at the Supreme Court, what for Justice Johnson had "been long since settled in public opinion"<sup>42</sup> was the resolution of the federal common-law issue as Republicans had defined it. Republican partisans such as St. George Tucker knew also that it was important to consider "candidly, and respectfully," judicial statements about the existence of a national common law, lest they

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antagonism not new in American life and much commented on at the time by foreign writers." G. HASKINS, *FOUNDATIONS OF POWER: JOHN MARSHALL, 1801-1815 (PART ONE)* 157 (1981). Others, not without reason, suspected lawyers of lingering Toryism. See Morris, *Legalism Versus Revolutionary Doctrine in New England*, in *ESSAYS IN THE HISTORY OF EARLY AMERICAN LAW*, *supra* note 23, at 431-32.

<sup>37</sup> See F. AUMANN, *THE CHANGING AMERICAN LEGAL SYSTEM: SOME SELECTED PHASES* 79-80 (1940); 2 A. CHROUST, *supra* note 28, at 67; Waterman, *Thomas Jefferson and Blackstone's Commentaries*, in *ESSAYS IN THE HISTORY OF EARLY AMERICAN LAW*, *supra* note 23, at 453 n.12. The attempts to ban British citations expressed more of a mood on the part of legislators than anything else; in practice they do not seem to have had much effect. See L. FRIEDMAN, *supra* note 29, at 98.

<sup>38</sup> Goebel, *The Common Law and the Constitution*, in *CHIEF JUSTICE JOHN MARSHALL* 112-13, 119-22 (W. Jones ed. 1956). Justice Iredell, dissenting in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), declared nonetheless that the common law was "the ground-work of the laws in every state in the Union, and . . . so far as it is applicable to the peculiar circumstances of the country, and where no special act of legislation controls it, to be in force in each state, as it existed in England (unaltered by any statute), at the time of the first settlement of the country." *Id.* at 435.

<sup>39</sup> Letter from James Monroe to John Breckenridge (Jan. 15, 1802), *quoted in* 3 A. BEVERIDGE, *THE LIFE OF JOHN MARSHALL: CONFLICT AND CONSTRUCTION 1800-1815*, at 59 (1919).

<sup>40</sup> *Aurora*, Jan. 30, 1805, *quoted in* 2 A. CHROUST, *supra* note 28, at 66. Mary K. Tachau maintains "that the animosity felt toward the English political and imperial connection was not extended to the English legal system." M. TACHAU, *supra* note 25, at 78. She is right in terms of the actual operations of the state and federal court systems. But it cannot be denied that there was a sizable body of public opinion against the use of the British common law in America. That the common law persisted in practice even while enduring public excoriation may be attributed in large measure to the endemic reluctance of the legal profession to change its ways, and to the sheer immensity of the task of reforming a legal system.

<sup>41</sup> 11 U.S. (7 Cranch) 32 (1812).

<sup>42</sup> *Id.*

"soon acquire the force of *precedents*," and thereafter be "more difficult to be shaken than the most cogent arguments, when drawn from reason alone."<sup>43</sup>

### B. *Federal Common Law and the Problem of States' Rights*

The *Hudson* decision rested on two arguments. The first emphasized federalism, that "[t]he powers of the general Government are made up of concessions from the several states."<sup>44</sup> A second theme branched off into what modern constitutional interpretation would identify as a separation-of-powers principle. Only the Supreme Court "possesses jurisdiction derived immediately from the Constitution,"<sup>45</sup> all other federal courts take their jurisdiction from Congress, whose power to create inferior federal courts "necessarily implies the power to limit the jurisdiction of those Courts to particular objects."<sup>46</sup> For the Republicans, these arguments were essentially derived from the same underlying concern, which was to deny that federal courts had been given a general common-law jurisdiction by the Constitution. The intent of the opinion emerges when it is placed in the context of the partisan struggles of the 1790's. The opinion was designed to refute a supposed contention of the Federalists: that federal courts possessed a jurisdiction akin to the common-law courts of England—a connotation that would have entirely displaced the independent authority of the states.

In addition to fearing the effects of a greatly expanded jurisdiction for the federal judiciary, Jefferson and his followers were worried about a concomitant escalation in the power and reach of the other branches of the federal government. St. George Tucker's 1803 edition of Blackstone's *Commentaries*, which contained a discourse presenting the Republican view of federal common law, bared the concern:

This question is of very great importance, not only as it regards the limits of the jurisdiction of the *federal courts*; but also, as it relates to the extent of the powers vested in the *federal government*. For, if it be true that the common law of England, has been adopted by the United States in their national, or federal capacity, the jurisdiction of the *federal courts* must be co-extensive with it; or, in other words, *unlimited*: so also, must be the jurisdiction, and authority of the

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<sup>43</sup> Tucker, *Appendix* to 1 W. BLACKSTONE, COMMENTARIES 380 note E (S. Tucker ed. 1803).

<sup>44</sup> 11 U.S. (7 Cranch) at 32.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

*other branches* of the federal government; that is to say, their powers respectively must be, likewise, *unlimited*.<sup>47</sup>

A certain logic supported Tucker's reasoning. An accepted axiom of his era was that judicial power had to be "co-extensive" with legislative authority. Originally the idea was, as James Wilson explained to the Pennsylvania ratifying convention, that "the judicial [powers] were commensurate with the legislative powers [and] went no further."<sup>48</sup> This both limited judicial authority and provided "the means of making the provisions" of congressional laws "effectual over all that country included within the Union."<sup>49</sup>

Tucker turned this principle on its head by arguing that the Federalist plan to extend the jurisdiction of federal courts would necessarily entail a commensurate expansion of the powers of the national legislature. The Federalists, Tucker maintained, must intend "the establishment of a general consolidated government, which should swallow up the state sovereignties, and annihilate their several jurisdictions, and powers, as *states*."<sup>50</sup> For Tucker such a consolidated federal government would violate the fundamental premise of the Union, by which the federal government had "powers limited to certain determinate objects; viz. their intercourse and concerns with foreign nations; and with each other, as separate and independent states; and, as members of the same confederacy: leaving the administration of their internal, and domestic concerns, to the absolute and uncontrollable jurisdiction of the states, respectively."<sup>51</sup>

<sup>47</sup> Tucker, *supra* note 43, at 380 note E.

<sup>48</sup> 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 515 (J. Elliot ed. 1836) [hereinafter cited as ELLIOT'S DEBATES].

<sup>49</sup> *Id.* See also 3 *id.* at 517 (Edmund Pendleton, Virginia Convention) ("[T]he power of that judiciary must be coëxtensive with the legislative power, and reach to all parts of society intended to be governed."); *id.* at 532 (James Madison, Virginia Convention) ("[T]he judicial power should be correspond with the legislative . . ."); 4 *id.* at 156 (William R. Davie, North Carolina Convention) ("[T]he judicial power should be coëxtensive with the legislative."). Years later, Chief Justice Marshall would describe as a "political axiom" the principle "that the judicial power of every well constituted government must be co-extensive with the legislative, and must be capable of deciding every judicial question which grows out of the constitution and laws." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 384 (1821).

<sup>50</sup> Tucker, *supra* note 43, at 412 note E.

<sup>51</sup> *Id.* Peter Du Ponceau, writing in 1824, easily dispatched the notion that the scope of powers of each of the three branches of the federal government must be identical:

It must not be believed that our Constitution has given to the national legislature powers co-extensive with those that it has conferred upon the judiciary. There are many cases in which the judiciary can act, nay, when it must act, on subjects which the legislation of Congress cannot reach.

Although Tucker's enumeration of federal powers seems remarkably short by modern standards, his description fairly tracks the language used by the old Federalists during the ratification debates. The expression "consolidated government" had been invoked by the Antifederalists as a slogan to describe what they projected the federal establishment would become.<sup>52</sup> While history eventually proved the Antifederalists right in many respects, those defending the new Constitution denied that consolidation was their purpose. Speaker after speaker echoed Edmund Pendleton, who assured listeners in the Virginia Convention that national authority "only extends to the general purposes of the Union. It does not intermeddle with the local, particular affairs of the states."<sup>53</sup> Likewise, Francis Corbin told the same assembly, "The powers of the general government are only of a general nature, and their object is to protect, defend, and strengthen the United States; but the internal administration of government is left to the state legislatures . . . ."<sup>54</sup>

Federalists had insisted at the ratification conventions that the Constitution's structure did not embrace a consolidation plan. "[A]ny authority" exercised by the federal government, James Iredell had said,

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Thus, in civil matters, the federal Courts have jurisdiction of all controversies between two or more states, between a state, plaintiff, and citizens of another state, between citizens of different states, between citizens of the same state claiming lands under grants of different states, and between a state or the citizens thereof, and foreign states, citizens, or subjects. It cannot be pretended that Congress have the power to legislate on all the various subjects that may give rise to those controversies, although the judiciary are authorised to decide on all and every of them, whenever properly brought within their jurisdiction. And it matters not whether the law which they dispense be the common law, or any other applicable to the subject.

P. DU PONCEAU, *supra* note 6, at 32-33 (footnote omitted).

<sup>52</sup> As Patrick Henry said during the Virginia debates, "That this is a consolidated government is demonstrably clear; and the danger of such a government is, to my mind, very striking." 3 ELLIOT'S DEBATES, *supra* note 48, at 22. Antifederalists also saw the connection between extensive legislative and judicial powers. George Mason criticized the proposed article III on this basis. Quoting the "arising under" language from that provision, he argued:

What objects will not this expression extend to? Such laws may be formed as will go to every object of private property. When we consider the nature of these courts, we must conclude that their effect and operation will be utterly to destroy the state governments; for they will be the judges how far their laws will operate. . . . To those who think that one national, consolidated government is best for America, this extensive judicial authority will be agreeable; but I hope there are many in this Convention . . . who see their political happiness resting on their state governments.

*Id.* at 521-22 (Virginia Convention).

<sup>53</sup> *Id.* at 40.

<sup>54</sup> *Id.* at 107.

must be "expressly given to it."<sup>55</sup> These were "particularly enumerated"<sup>56</sup> powers, George Nicholas observed at the Virginia sessions; "accurately and minutely defined,"<sup>57</sup> James Wilson advised delegates in Pennsylvania. Regarding the content of those enumerated powers, Federalists gave an account very similar to Tucker's. Madison, who had been among the more forward proponents of national powers at the Convention (even endorsing a congressional negative on laws passed by state legislatures),<sup>58</sup> wrote in *The Federalist*:

The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation and foreign commerce; with which last the power of taxation will for the most part be connected. The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State.<sup>59</sup>

Republicans felt betrayed, to say the least, when the Washington and Adams administrations adopted programs that the Republicans considered to have no justification in any of the delegated powers. When defending his plan for a national bank (which was based on the model of the Bank of England), Hamilton advised Washington that "it is unquestionably incident to *sovereign power* to erect corporations, and

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<sup>55</sup> 4 *id.* at 166 (North Carolina Convention).

<sup>56</sup> 3 *id.* at 451.

<sup>57</sup> 2 *id.* at 468.

<sup>58</sup> The proposed article would have given Congress the right "to negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21 (M. Farrand ed. 1911). Madison spoke in favor of a similarly worded proposal, saying "[n]othing short of a negative" could protect against the states' "propensity . . . to disturb the system." 2 *id.* at 27. Without a negative, the states could "pass laws which will accomplish their injurious objects before they can be repealed by the [General Legislature] or be set aside by the National Tribunals." *Id.* It has been argued that the nationalists at the Convention worked to broaden federal judicial jurisdiction and to establish a system of inferior federal courts in order to compensate for the defeat of the negative plan, and thus to ensure federal control over the states. Although advocates of states' rights did not oppose the jurisdictional proposal, they did object to the creation of inferior federal courts. The plan as adopted, leaving to Congress the decision to establish inferior federal courts, resulted from a compromise between the nationalists and advocates of states' rights. See J. SCHMIDHAUSER, THE SUPREME COURT AS FINAL ARBITER IN FEDERAL-STATE RELATIONS, 1789-1957, at 13 (1958).

<sup>59</sup> THE FEDERALIST No. 45, at 313 (J. Madison) (J. Cooke ed. 1961).

consequently to *that* of the United States, in *relation to the objects* intrusted to the management of the government.”<sup>60</sup> More generally, Hamilton insisted that when a government was given authority over a particular object, “it is incident to a general *sovereign* or *legislative power* to *regulate* a thing, to employ all the means which relate to its regulation to the *best & greatest advantage*.”<sup>61</sup>

Jefferson, then Secretary of State, had submitted his own report to Washington, and among other points he noted “that the very power now proposed *as a means*, was rejected *as an end*, by the Convention which formed the constitution.”<sup>62</sup> He was very likely right. Madison, in fact, had proposed to the Convention a power “to grant charters of incorporation where the interest of the U.S. might require.”<sup>63</sup> Rufus King objected that “the States will be prejudiced and divided into parties by [Madison’s proposal]—In Philad[elphia] & New York, It will be referred to the establishment of a Bank, which has been a subject of contention in those Cities.”<sup>64</sup> The proposal lost at the Convention,<sup>65</sup> but President Washington signed Hamilton’s bill.<sup>66</sup>

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<sup>60</sup> A. Hamilton, Opinion on the Constitutionality of an Act to Establish a Bank (Feb. 23, 1791), *reprinted in* 8 THE PAPERS OF ALEXANDER HAMILTON 63, 99 (H. Syrett ed. 1965).

<sup>61</sup> *Id.* at 100-01.

<sup>62</sup> T. Jefferson, Opinion on the Constitutionality of the Bill for Establishing a National Bank (Feb. 15, 1791), *reprinted in* 19 THE PAPERS OF THOMAS JEFFERSON 277 (J. Boyd ed. 1974). Jefferson wrote that all actions of the federal government must be specifically grounded in one of the delegated powers. As to the “necessary and proper” clause, he argued in effect that the proposed action literally must be required to accomplish the enumerated end. Sheer “convenience” was not enough to make an action “necessary,” since that “would swallow up all the delegated powers.” *Id.* at 278. Jefferson warned Washington that “[to] take a single step beyond the boundaries thus specially drawn around the powers of Congress, is to take possession of a boundless field [sic] of power, no longer susceptible of any definition.” *Id.* at 276.

While this contention eventually became a central tenet of the Republican party, Julian Boyd has argued that both Madison and Jefferson “had frequently upheld the doctrine of implied or inherent powers advanced by Hamilton . . . Madison most conspicuously in *The Federalist* No. 44 and [Jefferson] most radically in arguing for a treaty he considered beyond the powers of the Confederation.” *Id.* at 281 (editorial note). Boyd suggests that the “implied powers” issue “was raised belatedly . . . primarily as a weapon of defense.” *Id.* Their real concerns were elsewhere, such as fear that the Bank would become a pretext for “keeping the government in Philadelphia.” *Id.* More fundamentally, the Bank question reflected underlying tensions between agrarian and mercantile interests on such issues as the desirability of centralized government and a credit economy. See B. HAMMOND, BANKS AND POLITICS IN AMERICA 116 (1957).

<sup>63</sup> 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 58, at 615.

<sup>64</sup> *Id.* at 616.

<sup>65</sup> See *id.*

<sup>66</sup> Hamilton answered Jefferson’s argument by first contending that “very different accounts are given of the import of the proposition and of the motives for rejecting it. Some affirm that it was confined to the opening of canals and obstructions in rivers;

Jefferson's private attitude toward Hamilton decisively changed at the time of Hamilton's action regarding the Bank.<sup>67</sup> Opposition newspapers denounced the Bank as unconstitutional.<sup>68</sup> They charged that it had been "foisted upon the nation by mercantile interests,"<sup>69</sup> and would benefit "stock-jobbers"<sup>70</sup> and "'interested sycophants'"<sup>71</sup> at the public's expense. Nevertheless, Jefferson, Madison, and their more moderate supporters of the early 1790's were not pushed into a coalition with the radical elements of the Democratic movement until the coming of the events surrounding the Alien and Sedition Acts.<sup>72</sup> As Richard Ellis relates:

[F]earing that Hamilton planned to make use of the army to destroy his internal political opposition and put an end to the Republic . . . Republicans' opposition to Federalist measures took on a new intensity and urgency. They uncompromisingly assaulted and denounced their opponents' centralizing policies, and they increasingly resorted to extremist rhetoric to distinguish themselves from the Federalists.<sup>73</sup>

Opposition to the Sedition Act was founded in part on an emerging understanding that the free exchange of ideas is vital to the functioning of a democratic society. Sedition was a concept more suited to a political relationship in which citizens were subordinate to a sovereign, than it was to one in which citizens themselves were sovereign.<sup>74</sup> But Jefferson, notwithstanding his espousal of a free press, emphasized time

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others, that it embraced banks; and others, that it extended to the power of incorporating generally." A. Hamilton, *supra* note 60, at 111. Then, conceding that the Bank might have been discussed at the Convention, Hamilton rejected this fact as irrelevant:

[W]hatever may have been the intention of the framers of a constitution, or of a law, that intention is to be sought for in the instrument itself, according to the usual & established rules of construction. Nothing is more common than for laws to *express* and *effect*, more or less than was intended. If then a power to erect a corporation, in any case, be deducible by fair inference from the whole or any part of the numerous provisions of the constitution of the United States, arguments drawn from extrinsic circumstances, regarding the intention of the convention, must be rejected.

*Id.*

<sup>67</sup> See L. WHITE, *THE FEDERALISTS* 223 (1948); Carter, *The Birth of a Political Economist: Matthew Carey and the Recharter Fight of 1801-1811*, 33 PA. HIST. 274, 280 (1966).

<sup>68</sup> See D. STEWART, *THE OPPOSITION PRESS OF THE FEDERALIST PERIOD* 51-53 (1969).

<sup>69</sup> *Id.* at 362.

<sup>70</sup> *Id.* at 51.

<sup>71</sup> *Id.* at 52 (quoting *Plain Truth*, Philadelphia National Gazette, Oct. 17, 1792).

<sup>72</sup> See R. ELLIS, *supra* note 36, at 272-74.

<sup>73</sup> *Id.* at 274.

<sup>74</sup> See L. LEVY, *JEFFERSON AND CIVIL LIBERTIES* 54-55 (1963).



and again the controversy's connection with the issue of states' rights.<sup>75</sup> And in the congressional debates, a hot topic of controversy was whether the Act fell within the powers enumerated in article I.

A House Committee Report in 1799 on the proposed repeal of the Sedition Act gave a thoroughly Federalist justification for Congress's action:

[A] law to punish false, scandalous, and malicious writings against the Government, with intent to stir up sedition, is a law necessary for carrying into effect the power vested by the Constitution in the Government of the United States, and in the departments and officers thereof, and, consequently, such a law as Congress may pass; because the direct tendency of such writings is to obstruct the acts of the Government by exciting opposition to them, to endanger its existence by rendering it odious and contemptible in the eyes of the people, and to produce seditious combinations against the laws, the power to punish which has never been questioned; because it would be manifestly absurd to suppose that a Government might punish sedition, and yet be void of power to prevent it by punishing those acts which plainly and necessarily lead to it; and, because, *under the general power to make all laws proper and necessary* for carrying into effect the powers vested by the Constitution in the Government of the United States, Congress has passed many laws for which no express provision can be found in the Constitution, and the constitutionality of which has never been questioned . . . .<sup>76</sup>

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<sup>75</sup> See Jay, *Part One*, at 1091-92.

<sup>76</sup> 9 ANNALS OF CONG. 2988 (1799) (emphasis added). Federal judges presented similar arguments in defending the Sedition Act in circuit court opinions. Justice Paterson, for example, recorded the following in a handwritten notebook titled "Opinions on the Bench":

No government can long exist, where libellous publications against its executive and legislative authorities, their acts and measures are suffered to pass with impunity. The power of punishing such offences is a necessary instrument or mean of self preservation. No authority is expressly given to Congress to make laws to punish frauds on the revenue, or forgeries of bills or notes of the bank of the U. States, or resistance to the judicial process of the U. States, or taking away or falsifying any record or process of the same. And yet Congress have passed laws on these subjects, as coming within the general clause of the constitution.

W. Paterson, William Paterson Papers 1783-1804, at 531-33 [original in New York Public Library; copy on file with the *University of Pennsylvania Law Review*]. In the same notebook, Paterson said that the Sedition Act is "clearly within the words of the const[itution] . . . that Congress shall have power to provide for the com[mon] defence and general welfare of the U. States, to suppress insurrections, and to make all laws,

Republicans were furious at this explanation and correctly recognized that its principle must "embrace the punishment of any offences whatever."<sup>77</sup> Worse, the expansive use of the "necessary and proper" clause would obliterate the limitations that the Framers had imposed by conferring only enumerated powers:

The suggestion on which the authority over the press is founded, is, that seditious writings have a tendency to produce opposition to Government. What has a greater tendency to fit men for insurrection and resistance to Government, than dissolute, immoral habits, at once destroying love of order, and dissipating the fortune which gives an interest in society?

The doctrine that Congress can punish any act which has a tendency to hinder the execution of the laws, as well as acts which do hinder it, will, therefore, clearly entitle them to assume a general guardianship over the morals of the people of the United States.

. . . It would be very easy to connect every sort of authority used by any Government with the well-being of the General Government, and with as much reason as the committee had for their opinion to assign the power to Congress, although the consequence must be the prostration of the State Governments.<sup>78</sup>

Aggravating the Republicans' apprehension that Federalists were ignoring constitutional limits on the federal domain was the substance of the asserted abuse. At the Convention, a motion had been made to include a provision stating "that the liberty of the Press should be inviolably observed."<sup>79</sup> Roger Sherman interposed that "it is unnecessary—The power of Congress does not extend to the Press"—and the proposal was defeated.<sup>80</sup> At the ratification conventions, Antifederalists clamored for a Bill of Rights to ensure liberties such as a free press. The standard Federalist answer had been, "The general government has no powers but what are expressly granted to it; it therefore has no power to take away the liberty of the press."<sup>81</sup> That Federalists at the

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which shall be necessary and proper for carrying into execution the powers delegated to them." *Id.* at 545.

<sup>77</sup> 8 ANNALS OF CONG. 2158 (1798) (Rep. Gallatin).

<sup>78</sup> 9 ANNALS OF CONG. 3004-05 (1799) (Rep. Nicholas).

<sup>79</sup> 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 58, at 617.

<sup>80</sup> *Id.* at 618.

<sup>81</sup> 4 ELLIOT'S DEBATES, *supra* note 48, at 315 (Charles C. Pinckney, South Car-

time of ratification had the same observations regarding other personal liberties<sup>82</sup> undoubtedly was not comforting to Republicans of the post-1798 generation. To the Republicans a plain truth was involved: Federalists cared more about protecting values such as property and contract than respecting commitments that gave the people a direct voice in government and ensured essential freedoms.<sup>83</sup>

The Federalist position that sedition was a federal common-law crime<sup>84</sup> made it easy for Republicans to view the common-law question as one implicating states' rights. The list of crimes cognizable by the British common law was of considerable length, and, by the very nature of that system, its capacity for expansion was unlimited. These fears already had surfaced in the ratification debates. James Iredell explained to delegates at the North Carolina Convention that the Constitution included provision for only a select number of federal crimes: "[The federal government will] have power to define and punish piracies and felonies committed on the high seas, and offences against the law of nations. [It will] have no power to define any other crime whatever."<sup>85</sup> He specifically denied an Antifederalist accusation that "the government might make it treason to write against the most arbitrary proceedings."<sup>86</sup> Representative Nathaniel Macon pointedly placed Iredell's earlier statement in the congressional record, including as well Iredell's assurance that the federal government could claim no powers "but such as are so enumerated."<sup>87</sup>

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olina Convention); *accord* 2 *id.* at 449 (James Wilson, Pennsylvania Convention); 3 *id.* at 469 (Edmund Randolph, Virginia Convention); 4 *id.* at 208 (Richard D. Spaight, North Carolina Convention).

<sup>82</sup> See, e.g., 4 *id.* at 208 (Richard D. Spaight, North Carolina Convention) (freedom of religion); 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 58, at 310 app. A (Edmund Randolph, Virginia Convention) (freedom of religion). With the first amendment in place, Federalists defending the Sedition Act introduced a perverse twist of reasoning. Justice Paterson, one of the Framers, explained that the amendment "supposes the power over the press to be in congress, and prohibits them only from abridging the freedom allowed to it by the common law." W. Paterson, *supra* note 76, at 539.

<sup>83</sup> See S. BROWN, THE FIRST REPUBLICANS 25-26 (1954). Gordon Wood writes, "Because the Federalists believed that the frenzied advocacy of a bill of rights by most Antifederalists masked a basic desire to dilute the power of the national government in favor of the states, they were determined to resist all efforts at amendment." G. WOOD, *supra* note 21, at 537.

<sup>84</sup> See Jay, *Part One*, at 1077.

<sup>85</sup> 4 ELLIOT'S DEBATES, *supra* note 48, at 219.

<sup>86</sup> *Id.*

<sup>87</sup> 8 ANNALS OF CONG. 2152 (1798). Shortly thereafter, Justice Iredell stated to a grand jury that his position at the ratification convention had been grounded in a "superficial view," and that he was now "convinced it was an erroneous opinion." Charge to the Grand Jury for the District of Pennsylvania (Apr. 11, 1799), *reprinted in* Claypoole's American Daily Advertiser (Philadelphia), May 17, 1799.

It did not calm the moment that the Federalists' interpretation of the first amendment followed Blackstone almost to the letter. The Committee Report on the Alien and Sedition Laws stated that

the liberty of the press consists not in a license for every man to publish what he pleases without being liable to punishment, if he should abuse this license to the injury of others, but in a permission to publish, without previous restraint, whatever he may think proper, being answerable to the public and individuals, for any abuse of this permission to their prejudice.<sup>88</sup>

Representative Nicholas accurately asserted that this view was straight from Blackstone, who he said was "mak[ing] a theory to justify the actual state of the [English] law. . . . [T]he nature of their Government justifies more rigor than is consistent with ours,"<sup>89</sup> which was one under a written constitution that restricted congressional power over the press.<sup>90</sup> Reliance on British principles in this manner made Republicans less than enthusiastic about the constantly reiterated Federalist expression, that "[w]ithout recurring to the common law the Constitution could neither be explained nor executed."<sup>91</sup> For the Republicans, this was mere subterfuge, yet another device to alter the Republic.

### C. *Federal Common Law as a Separation-of-Powers Issue: The Horwitz Thesis*

Placing this emphasis on the connection between the federal common law and states' rights may appear unwarranted, particularly since we are now more likely to regard the necessity for statutory crimes as a component of constitutional due process, or, at times, freedom of expression. Morton Horwitz, while acknowledging the preoccupation of Republicans with consolidation, writes that "it is difficult to understand precisely what the Jeffersonian argument was all about."<sup>92</sup> Republicans such as James Sullivan of Massachusetts, Horwitz points out, saw no constitutional infirmity in federal common-law jurisdiction, so long as the offense could be proscribed by Congress under its legislative powers. "[T]here was no real issue," Horwitz concludes, "concerning the proper allocation of powers between national and state govern-

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<sup>88</sup> 9 ANNALS OF CONG. 2988 (1799). The report noted that "[i]n the several States the liberty of the press has always been understood in this manner." *Id.* at 2989.

<sup>89</sup> 9 ANNALS OF CONG. 3009 (1799).

<sup>90</sup> *Id.* at 3008-09.

<sup>91</sup> 10 ANNALS OF CONG. 411 (1800) (Rep. Bayard).

<sup>92</sup> M. HORWITZ, *supra* note 23, at 10.

ments, and, in fact . . . the only respectable constitutional question involved the separation of powers between legislature and judiciary."<sup>93</sup>

Horwitz advances this argument in the course of presenting a grander thesis—that Americans at that time were becoming increasingly cognizant of the instrumental character of adjudication and of the discretionary powers wielded by judges. This recognition, in turn, he associates with a progressive rejection of the common law as "a known and determinate body of legal doctrine," whose basis was "'the law of nature and its author.'"<sup>94</sup> Historians, Horwitz contends, "[d]ue to an excessive preoccupation with the political and constitutional dimensions of the struggle over common-law crimes . . . have not fully appreciated the underlying change in the conception of law that laid the foundation for the constitutional struggle."<sup>95</sup>

Critics have disputed Horwitz's success at demonstrating such a clear attitudinal shift in Americans' conception of law,<sup>96</sup> and there is skepticism regarding his overall claim that common-law courts were systematically biased toward certain classes.<sup>97</sup> With regard to federal common-law crimes, it surely was true that various individuals derided the "discretion" and "legislating" of judges.<sup>98</sup> Nevertheless, by removing his analysis almost totally from the political struggles of the period, Horwitz fails to perceive the principal reasons for anxiety over judicial activity.

Horwitz observes that "the only respectable constitutional question" concerning federal common-law jurisdiction was a separation-of-powers argument. From the standpoint of current constitutional doctrine, that statement is accurate. For purposes of historiography, however, an argument should not be dismissed merely because it now lacks appeal. Republicans of that generation were obsessed with states' rights, and regarded consolidation as a real possibility fostered by a party whose membership was thought to include monarchists.<sup>99</sup>

Horwitz does buttress his assessment that the concern focused on

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 4 (quoting Otis, *A Vindication of the British Colonies*, in 1 PAMPHLETS OF THE AMERICAN REVOLUTION 563 (B. Bailyn ed. 1965)).

<sup>95</sup> *Id.* at 11.

<sup>96</sup> See, e.g., Simpson, *The Horwitz Thesis and the History of Contracts*, 46 U. CHI. L. REV. 533 (1979).

<sup>97</sup> See Epstein, *The Social Consequences of Common Law Rules*, 95 HARV. L. REV. 1717, 1717-18 (1982).

<sup>98</sup> See Jay, *Part One*, at 1052.

<sup>99</sup> Professor Tribe reminds us that, in roughly the pre-Civil War period, tyranny was associated with "centralized accumulation of power in any man or single group of men," and "the vitality and autonomy of the states" was relied upon as "a major source of individual rights and security." L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 1-2, at 2 (1978).

separation of powers by maintaining that "[m]ost thoughtful representatives" of the Republican position saw no separation-of-powers problem, provided that Congress authorized the development of common-law crimes.<sup>100</sup> Actually, the thought of leading Republicans, such as Justice Johnson, was not so simple.<sup>101</sup> Many Republicans did concede congressional power to declare crimes, so long as they fell within the scope of an enumerated power.<sup>102</sup> Their idea of the range of enumerated powers, however, was extremely constrained, usually limited to those expressly mentioned in the Constitution.<sup>103</sup> In addition, Republicans rejected the Federalists' broad reading of the "necessary and proper" clause.<sup>104</sup> Republicans in the late 1790's accused Federalists of scheming to dissolve any limitations on federal authority through the wholesale incorporation of British common law, which would have rendered legislative authority boundless.<sup>105</sup> By writing *Hudson* "broadly" (to recall Justice Johnson's expression), the Supreme Court dashed any such expansion of federal power. Furthermore, there was a difference in Johnson's mind between Congress's defining specific offenses in a criminal code and its authorizing the judicial development of common-law crimes.<sup>106</sup>

Attitudes toward the authority to make common law were undoubtedly in transition, but the American states would rely on common-law crimes until well into the nineteenth century.<sup>107</sup> Moreover, the conception of law as a body of principles subject to "discovery" found many adherents throughout the 1800's, including the Court that wrote *Swift v. Tyson*.<sup>108</sup> When assessing ideological shifts, we need to bear in mind that, as in contemporary society, the public under investigation was diverse, changeable, and inconsistent. Furthermore, there is usually no single factor that explains the events of a period, and isolating "causes" from "effects" is immensely difficult. In this period, one's philosophy of federal judicial authority was the result of years of developing arguments, which themselves were influenced by societal events.

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<sup>100</sup> M. HORWITZ, *supra* note 23, at 10, 271 n.39 (citing Trial of William Butler for Piracy 34-35 (1813) [original pamphlet in Harvard Law School Library; copy on file with the *University of Pennsylvania Law Review*]); Tucker, *supra* note 43, at 429-30 note E. For a discussion of *Butler*, see *infra* notes 305 & 312.

<sup>101</sup> See *infra* text accompanying notes 304-12.

<sup>102</sup> See, e.g., 8 ANNALS OF CONG. 2159 (Rep. Gallatin); see also Jay, *Part One*, at 1103-04.

<sup>103</sup> See Jay, *Part One*, at 1103.

<sup>104</sup> See *supra* text accompanying notes 77-78.

<sup>105</sup> See *supra* text accompanying notes 10-11 & 34-40.

<sup>106</sup> See *infra* text accompanying notes 307-08.

<sup>107</sup> See Jay, *Part One*, at 1063.

<sup>108</sup> 41 U.S. (16 Pet.) 1 (1842). For a discussion of *Swift*, see *infra* text accompanying notes 180-85.

Virtually every statement about the common law produced a rebuttal, which itself induced a reaction.

We must also be wary of what political actors say, and focus instead on what they actually do. In casting theories about the past, our quest for coherent explanation may succeed in attributing logic to an ideology when none existed. Horwitz, for example, cites Justice Iredell as representative of "the jurist of the eighteenth century," for his statement in *Chisholm v. Georgia*<sup>109</sup> "that the distinct boundaries of law and legislation [must not] be confounded,' since 'that would make courts arbitrary, and, in effect *makers of a new law*, instead of being (as certainly they alone ought to be) *expositors of an existing one*.'" <sup>110</sup> Yet a scant few months later, Iredell reversed himself on the question of federal common-law crimes and joined in instructing the jury in *Henfield's Case*,<sup>111</sup> a case the Republican press denounced as a prosecution for a crime not statutorily defined.<sup>112</sup>

Similarly, Judge William Cranch of the Circuit Court of the District of Columbia declared that "the least possible range ought to be left for the discretion of the judge."<sup>113</sup> Scarcely two years earlier he and another Federalist judge had directed the district attorney to prosecute the editor of a Republican newspaper for common-law libel. The publication, *National Intelligencer*, one of the Jefferson administration's prime organs, had printed a letter attacking the judiciary and defending Jefferson's removal of Federalist marshals and government attorneys. When the Republican prosecutor refused to proceed, and the grand jury to indict, the case was dropped. Still, Cranch's actions were viewed as an obnoxious example of judicial partisanship, and contributed to Jefferson's decision to dismantle the 1801 Judiciary Act.<sup>114</sup>

These seeming inconsistencies by Iredell and Cranch may be attributed to their actual belief in a common law of crimes fixed by natu-

<sup>109</sup> 2 U.S. (2 Dall.) 419 (1793).

<sup>110</sup> M. HORWITZ, *supra* note 23, at 9 (quoting *Chisholm*, 2 U.S. (2 Dall.) at 448) (emphasis added by Horwitz) (minor discrepancies corrected to match language in *Chisholm*).

<sup>111</sup> 11 F. Cas. 1099, 1119-20 (C.C.D. Pa. 1793) (No. 6360); *see also supra* note 87.

<sup>112</sup> *See Jay, Part One*, at 1066. During the ratification debates in North Carolina, Iredell had declared that a federal official "may be tried . . . for common-law offences, whether impeached or not." 4 ELLIOT'S DEBATES, *supra* note 48, at 37.

<sup>113</sup> 5 U.S. (1 Cranch) iii (1804) (remarks by Judge Cranch in preface to volume). Raoul Berger cites this as an example of the preinstrumentalist view that judges should not "make law as an instrument of social change." R. BERGER, GOVERNMENT BY JUDICIARY 306 (1977).

<sup>114</sup> *See* 1 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 194-98 (1932).

ral law.<sup>115</sup> Or it may be that, in the manner of political actors of every era, what is stated in principle has little relevance to practice. One possibility is that the judges had no coherent or set position. Like most of us, their ideologies were probably a shifting maze of values, hypotheses, emotions, and whatever else comprises the human psyche—all in a never completed process of personal evolution.

More importantly for understanding this era, the opponents of these judges viewed them through eyes fixed on conspiratorial motives. The judges were seen as part of a Federalist plot, whose main objective was a consolidated national government. Even Hamilton had made solemn declarations about the need to avoid judicial discretion through the application of known rules.<sup>116</sup> Republicans considered him capable of anything, including warping the Constitution to achieve a monarchy. The gauge of reality in these times was actions, not pious pronouncements. Theory was vital, but it was inseparable from the swirling controversies and posturing personalities of the day. Abstract positions abounded; they fluctuated and mutated with events, and became distorted beyond recognition by opponents.

#### D. *Theories of Federal Judicial Jurisdiction in the Early Republic*

##### 1. Federal Common Law and Article III

Republicans of the *Hudson* era rallied against a proposition that no serious rival was advancing. It would have been untenable to maintain that the body of British common law had been adopted by the Constitution, or that the federal judiciary possessed a jurisdiction equivalent to that of the central courts in England. No ingenious argument was needed to show that the proposition could not be sustained. In a Convention dominated at every turn by jealous state interests, such a general jurisdiction was entirely implausible.<sup>117</sup> To be sure, a constitution could not have been written without common-law terminology. As Du Ponceau would elaborately put it, "We live in the midst of the

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<sup>115</sup> Iredell was of the opinion that the common law formed the "ground-work" of laws in each state. See *supra* note 38.

<sup>116</sup> See Jay, *Part One*, at 1057. Hamilton later found it to "be useful to declare that all such writings &c which at common law are libels if levelled against any Officer whatsoever of the [United States] shall be cognizable in the Courts of the [United States]." Letter from Alexander Hamilton to Jonathan Dayton (Oct. or Nov. 1799), reprinted in 23 THE PAPERS OF ALEXANDER HAMILTON 604 (H. Syrett ed. 1976). Hamilton evidently intended this declaration to be accomplished by legislation, because he sent the recommendation to the Speaker of the House along with other legislative recommendations (including increased military expenditures and an expansion of the federal judiciary).

<sup>117</sup> See Eliot, *supra* note 12, at 505.



common law, we inhale it at every breath, imbibe it at every pore . . . [W]e cannot learn another system of laws without learning at the same time another language."<sup>118</sup> Receiving a system of law, along with the authority to apply it, was another matter entirely.

The way in which article III evolved in the Convention offers some support to a claim that the Framers envisioned an expansive federal jurisdiction. From a unanimous resolution on July 18, 1787, that "the jurisdiction of the national Judiciary shall extend to cases arising under laws passed by the general Legislature, and to such other questions as involve the National peace and harmony,"<sup>119</sup> the Convention produced the specific grants now in article III. Along the way, the delegates purposefully altered (without recorded discussion) the language, "laws passed by the general legislature," to read simply, "the laws of the United States."<sup>120</sup> Commentators have argued that an assembly of lawyers must have appreciated that this change invited "laws" to be read in the widest way, to include both statutory and common law.<sup>121</sup>

It is likely that we will never know with assurance what was meant by the deliberate use of "laws" in article III. Although to an eighteenth-century lawyer (which is what a majority of the Framers were) "laws" would have been taken to include rules emanating from decisions,<sup>122</sup> its addition to article III could not have been meant to accomplish a general reception of British common law. Americans of

<sup>118</sup> P. DU PONCEAU, *supra* note 6, at 91.

<sup>119</sup> 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 58, at 39. Madison's notes for the same day differ from this account, which is from the Journal. According to Madison, "under the Natl. laws" was adopted that day instead of "laws passed by the General Legislature." *See id.* at 46. The report of the Committee on Detail (Aug. 6, 1787) essentially uses the Journal version. *See id.* at 132-33, 186.

<sup>120</sup> *See id.* at 423-24, 431.

<sup>121</sup> *See* 1 W. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 620-22 (1953). *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938), would later explain that "laws" in section 34 of the 1789 Judiciary Act included both statutory and common law. *See infra* text accompanying notes 413-16; Note, *Federal Common Law and Article III: A Jurisdictional Approach to Erie*, 74 YALE L.J. 325, 331-32 (1964).

<sup>122</sup> *See* Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 388-89 (1964). Justice Paterson observed in the late 1790's that

[c]ases in law and in common law are synonymous expressions; so used by all legal writers and so understood by all lawyers. This is also the popular as well as the appropriate meaning of the terms. What are cases in law arising under the const[itution], as distinct from cases arising under the statutes of the U. States, and how are such cases to be tried? Clearly they are cases to be tried and decided by rules and principles, which existed and were in force prior to and independent of any legislative act of Congress.

W. Paterson, *supra* note 76, at 561. Paterson, of course, had been a delegate to the Convention.

that day, especially lawyers, would have expected a specific reception clause for that purpose, akin to those found in the states.<sup>123</sup> Given the existing variations in state common law,<sup>124</sup> it would have been impossible to insert such a clause into the Constitution without provoking a considerable row.

What seems most plausible is that the Convention left unresolved the future role of the judiciary, except in the broadest outline. Probably nothing more could have been done, since the extent of federal powers was not a matter of general agreement. With the judiciary, moreover, there were specific theoretical problems (arising from the novel federal system being structured) that complicated the question of what jurisdiction federal courts were to exercise. From the discussions of the period that have been preserved, one suspects that some of these difficulties were not well appreciated for a number of years.

To the extent the common law provoked any real controversy in the ratification period, it came from Antifederalists such as George Mason and Patrick Henry, who complained that under the proposed Constitution the people were not "secured even in the enjoyment of the benefit of the common law."<sup>125</sup> The Antifederalists used the term common law to mean the great rights associated with due process—trial by jury of the vicinage, the unreviewability of jury fact-finding,<sup>126</sup> protection against excessive bail, prohibition of unreasonable fines and cruel and unusual punishments, freedom from warrantless searches,<sup>127</sup> the necessity of grand jury indictment, the conduct of trial by established procedures (such as the right to counsel and cross-examination),<sup>128</sup> and

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<sup>123</sup> See Goebel, *supra* note 38, at 103-04. Between 1776 and 1784 all but two states provided by statute for the selective reception of British decisional law and statutes. See E. BROWN, *supra* note 26, at 23-24. A majority of these utilized a reception clause along the lines of the New Jersey Constitution of 1776: "[T]he common law of England, as well as so much of the statute law, as have been heretofore practiced in this colony, shall still remain in force, until they shall be altered by a future law . . . ." Hall, *The Common Law: An Account of Its Reception in the United States*, 4 VAND. L. REV. 791, 799 (1951).

<sup>124</sup> See 1 THE LAW PRACTICE OF ALEXANDER HAMILTON, *supra* note 27, at 31; Jay, *Part One*, at 1056.

<sup>125</sup> Mason, *Objections to This Constitution of Government*, in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 58, at 637; accord 3 ELLIOT'S DEBATES, *supra* note 48, at 446-48 (Patrick Henry, Virginia Convention).

<sup>126</sup> See, e.g., *Letters from the Federal Farmer (III)* (Oct. 10, 1787), reprinted in 2 THE COMPLETE ANTI-FEDERALIST 234, 244 (H. Storing ed. 1981). The Federal Farmer thought that these and other rights were denied in the proposed constitution: "I do not see a spark of freedom or a shadow of our own or the British common law." *Id.*

<sup>127</sup> See, e.g., *Letters of Centinel (II)* (1787), reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 126, at 143, 152-53.

<sup>128</sup> See 2 ELLIOT'S DEBATES, *supra* note 48, at 109-11 (Abraham Holmes, Massachusetts Convention).

so on. Far from claiming that the Framers intended to incorporate the British common law, the Antifederalists argued that Congress's power to regulate the proceedings of federal courts made the fate of these common-law procedural protections uncertain: "[W]e are ignorant whether [such proceedings] shall be according to the common, civil, the Jewish, or Turkish law . . . ." <sup>129</sup> Some pointed to an apparent commitment on the part of Federalists to replace the common law with civil law, <sup>130</sup> while others warned that nothing prevented Congress from establishing "that diabolical institution, the *Inquisition*." <sup>131</sup>

Antifederalists coupled their disgruntlement over the exclusion of common-law due process protections with what they saw as a related point: federal courts "must in time take away the business from the state courts entirely." <sup>132</sup> This "extensive jurisdiction," Mason warned, which encompassed "all cases arising under the system and the laws of Congress, may be said to be unlimited," <sup>133</sup> since "[s]uch laws may be formed as will go to every object of private property." <sup>134</sup> Invariably the federal judiciary was linked with "the direct tendency of the proposed system . . . to consolidate the whole empire into one mass." <sup>135</sup> After writing these last words, the essayist Agrippa went on to assert that the combination of an extensive federal jurisdiction and the supremacy

<sup>129</sup> *Id.* at 400 (Thomas Tredwell, New York Convention).

<sup>130</sup> See PENNSYLVANIA AND THE FEDERAL CONSTITUTION, 1787-1788, at 780 app. (J. McMaster & F. Stone eds. 1888) (remarks of John Smilie at Pennsylvania Convention, as noted by James Wilson).

<sup>131</sup> 2 ELLIOT'S DEBATES, *supra* note 48, at 111 (Abraham Holmes, Massachusetts Convention). Holmes asserted that Congress was "nowhere restrained from inventing the most cruel and unheard-of punishments, and annexing them to crimes; and there is no constitutional check on them, but that *racks* and *gibbets* may be amongst the most mild instruments of their discipline." *Id.*

<sup>132</sup> 4 ELLIOT'S DEBATES, *supra* note 48, at 164 (Samuel Spencer, North Carolina Convention); see also PENNSYLVANIA AND THE FEDERAL CONSTITUTION, 1787-1788, *supra* note 130, at 779 app. (remarks of Robert Whitehill at the Pennsylvania Convention, as noted by James Wilson) ("The judicial department is blended with and will absorb the judicial Powers of the several States; and Nothing will be able to stop its Way.").

<sup>133</sup> 3 ELLIOT'S DEBATES, *supra* note 48, at 523 (Virginia Convention).

<sup>134</sup> *Id.* at 521. William Grayson told the Virginia Convention that the federal courts' jurisdiction would be of "stupendous magnitude," "impossible for human nature to trace [in] its extent." *Id.* at 565.

<sup>135</sup> *Letters of Agrippa (V)* (Dec. 11, 1787), *reprinted in* 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 126, at 77. Antifederalists warned that under a consolidated government, states would be powerless to resist claims by British creditors, see 3 ELLIOT'S DEBATES, *supra* note 48, at 566 (William Grayson, Virginia Convention); states would be "carried to the federal court" and forced to honor depreciated continental currency at face value, *id.* at 319 (Patrick Henry, Virginia Convention); and individuals would be abused by federal revenue collectors, *id.* at 577. On the importance of the "consolidation" issue in ratification arguments, see H. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR 10-14 (1981).

clause would result in the application of federal rules of decision in both state and federal courts.<sup>136</sup> Others were convinced that "the powers of the judiciary may be extended to any degree short of almighty."<sup>137</sup> This extension would be facilitated, wrote Brutus, by the courts' use of the British device of expanding jurisdiction through legal "fictions."<sup>138</sup> Even Edmund Randolph, who would resign himself to voting for the Constitution's ratification, saw the instrument deficient "in limiting and defining the judicial power."<sup>139</sup>

Responding to these charges concerning the judiciary, defenders of the Framers' work were obliged both to give assurances that the common-law rights on which the Antifederalists insisted would continue to be recognized and to disclaim an extensive jurisdiction for the federal judiciary. Their success in simultaneously maintaining these two positions demonstrates that the common law was then seen in an entirely different light than it would be by the end of the 1790's. Part of the explanation for this change, however, lies in the fact that many of the arguments we now consider came from men who emerged as ardent Republicans in the next decade.

In the main, Federalists of the ratification era expressed amazement at the protest over the common law. Two types of argument characterized their rebuttal. First, Federalists sought to defeat the assertion that the common law was needed for its due process protections by stressing what adoption of the common law by the Constitution would entail. Edmund Randolph and Edmund Pendleton contended, as would be heard frequently some years later, that a constitutional reception of

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<sup>136</sup> See *Letters of Agrippa*, reprinted in 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 126, at 77-78; see also *Essays of Brutus (XII)* (Feb. 14, 1788), reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 126, at 427.

<sup>137</sup> 2 ELLIOT'S DEBATES, *supra* note 48, at 401 (Thomas Tredwell, New York Convention).

<sup>138</sup> *Essays of Brutus (XII)* (Feb. 14, 1788), reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 126, at 427-28. Likewise, the Federal Farmer suggested that "a very common legal fiction" could be employed to augment federal jurisdiction—the locus of a case, such as the place of contracting, would be irrebuttably presumed to lie in the "federal city." *Letters from the Federal Farmer (XVIII)* (Jan. 25, 1788), reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 126, at 346. In Pennsylvania, Centinel wrote that "[e]very person acquainted with the history of the courts in England, knows by what ingenious sophisms they have, at different periods, extended the sphere of their jurisdiction over objects out of the line of their institution . . . ." *Letters of Centinel (I)* (Oct. 5, 1787), reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 126, at 140. Dissenting members of the Maryland Convention argued in favor of the following amendment, surely one of the more futile proposals of all time: "That the federal courts shall not be entitled to jurisdiction by fictions or collusion." 2 ELLIOT'S DEBATES, *supra* note 48, at 550.

<sup>139</sup> Letter from Edmund Randolph to Virginia House of Delegates (Oct. 10, 1787), reprinted in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 58, at 127 app. A.

the common law would leave it "immutable,"<sup>140</sup> incapable of legislative revision. Madison, in a letter to Washington that specifically addressed Mason's contention, noted the necessity for such legislative control, as "every State has made great inroads & with great propriety in many instances on this *monarchical* code."<sup>141</sup> If the Convention "had in general terms declared the Common law to be in force," Madison remarked, "they would have broken in upon the legal Code of every State," bringing from England "a thousand heterogeneous & antirepublican doctrines, and even the *ecclesiastical Hierarchy itself*, for that is a part of the Common law."<sup>142</sup>

On a second track, the early Federalists denied that the due process rights of the common law had been excluded by the Constitution. "There is nothing in that paper to warrant the assertion," George Nicholas stated.<sup>143</sup> He went on to demonstrate how closely the matter of the common law had been associated with the general dispute over the missing Bill of Rights:

But the gentleman says that, by this Constitution, they have power to make laws to define crimes and prescribe punishments; and that, consequently, we are not free from torture. . . . Congress have power to define and punish piracies and felonies committed on the high seas, and offences against the laws of nations; but they cannot define or prescribe the punishment of any other crime whatever, without violating the Constitution. If we had no security against torture but our declaration of rights, we might be tortured tomorrow; for it has been repeatedly infringed and disregarded. A bill of rights is only an acknowledgment of the preëxisting claim to rights in the people. They belong to us as much as if they had been inserted in the Constitution.<sup>144</sup>

This link between the Bill of Rights and the common law is important in understanding the theory of federal law being advanced. Federalists repeatedly contended that a Bill of Rights was unnecessary,

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<sup>140</sup> See 3 ELLIOT'S DEBATES, *supra* note 48, at 469-70 (Edmund Randolph, Virginia Convention); *id.* at 550 (Edmund Pendleton, Virginia Convention).

<sup>141</sup> Letter from James Madison to George Washington (Oct. 18, 1787), *reprinted in* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 58, at 130 app. A.

<sup>142</sup> *Id.* Edmund Randolph likewise said before the Virginia Convention that constitutional incorporation of the common law would be "destructive to republican principles," which he illustrated by suggesting that it would result in use of the "*writ of burning heretics*." 3 ELLIOT'S DEBATES, *supra* note 48, at 469-70.

<sup>143</sup> 3 ELLIOT'S DEBATES, *supra* note 48, at 451 (Virginia Convention).

<sup>144</sup> *Id.*

since the powers of the federal government, and Congress in particular, were few and restricted.<sup>145</sup> Their line of defense was the same one that they had erected against the claim of an overreaching federal judiciary. "Of the two objects of judicial cognizance, one is general and national, and the other local," explained Edmund Pendleton in Virginia.<sup>146</sup> These "objects" were "separate and distinct,"<sup>147</sup> several advocates maintained, and William R. Davie ventured that in "no instance" could "the internal policy of the state . . . be affected by the judiciary of the United States."<sup>148</sup>

The Federalists thus advocated a modest role for the federal judiciary in the same manner that they maintained that national legislative authority should be strictly limited. Answering the allegation that the "arising under" jurisdiction would swallow up all state court business, John Marshall asked, "Has the government of the United States power to make laws on every subject? . . . Can they make laws affecting the mode of transferring property, or contracts, or claims, between citizens of the same state? Can they go beyond the delegated powers?"<sup>149</sup> Federalists emphasized that in most instances of federal jurisdiction the state courts would retain concurrent powers,<sup>150</sup> and it was often suggested that the state judiciaries would handle the bulk of federal judicial business.<sup>151</sup>

By submerging the concern for the common law with the overall matter of federal powers, the Federalists successfully shifted the ratification debates away from the issue. In fact, the judiciary did not become a dominant source of Antifederalist objections.<sup>152</sup> Left undevel-

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<sup>145</sup> See, e.g., Letter from George Washington to Marquis de LaFayette (Apr. 28, 1788), reprinted in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 58, at 297-98 app. A; 2 ELLIOT'S DEBATES, *supra* note 48, at 78-79 (Joseph Varnum, Massachusetts Convention); *id.* at 93 (Theophilus Parsons, Massachusetts Convention); *id.* at 437, 453-54 (James Wilson, Pennsylvania Convention); *id.* at 540 (Thomas M'Kean, Pennsylvania Convention); 3 *id.* at 203-04 (Edmund Randolph, Virginia Convention); *id.* at 246 (George Nicholas, Virginia Convention); 4 *id.* at 140-41, 161-62 (William Maclaine, North Carolina Convention); *id.* at 142 (Samuel Johnston, North Carolina Convention); *id.* at 148 (James Iredell, North Carolina Convention); *id.* at 259-60 (Charles Pinckney, South Carolina Convention); accord G. WOOD, *supra* note 21, at 539-40.

<sup>146</sup> 3 ELLIOT'S DEBATES, *supra* note 48, at 548.

<sup>147</sup> 4 *id.* at 139 (Richard Spaight, North Carolina Convention); *id.* at 140 (William Maclaine, North Carolina Convention).

<sup>148</sup> *Id.* at 160 (North Carolina Convention).

<sup>149</sup> 3 *id.* at 553 (Virginia Convention).

<sup>150</sup> See, e.g., 4 *id.* at 141 (Samuel Johnston, North Carolina Convention); *id.* at 163 (William Maclaine, North Carolina Convention); 3 *id.* at 554 (John Marshall, Virginia Convention).

<sup>151</sup> See C. WARREN, THE MAKING OF THE CONSTITUTION 539 (1928).

<sup>152</sup> See J. MAIN, THE ANTIFEDERALISTS: CRITICS OF THE CONSTITUTION 158 (1961).

oped by the manner in which the issue evolved was a theory of federal jurisdiction that might have explained what sources of law federal courts could draw upon. Indeed, the most revealing aspects of the Federalist posture in these years lie in what they *failed* to say about the relationship of the common law to the proposed federal court system.

While denying that the common law had been adopted in "general terms," Madison and others of his persuasion nevertheless did not dismiss a role for the common law in the nation's legal system. Yet there was a peculiar ambiguity in what was said on this score. Madison wrote that "[t]he Common law is nothing more than the unwritten law, and is left by all the Constitutions equally liable to legislative alterations."<sup>153</sup> Essentially he thought that this was not a proper subject for a constitution.<sup>154</sup> While noting that a Virginia ordinance had declared a portion of the common law to be in effect, Madison explained that this was done "merely to obviate pretexts that the separation from G. Britain threw us into a State of nature, and abolished all civil rights and obligations."<sup>155</sup>

Presumably Madison would have accepted a type of "unwritten law" for subjects appropriately within federal judicial competence. He had complained at the Convention of the "multiplicity" and "mutability" of the laws of "the several States,"<sup>156</sup> and saw the Supreme Court as a vehicle for providing uniformity in cases involving ambassadors and admiralty and maritime affairs. He went further to contend that in those areas federal jurisdiction should be exclusive.<sup>157</sup> Given that in his society judicially created law greatly exceeded that deriving from statutes,<sup>158</sup> it would be unusual to suppose that Madison intended to limit federal jurisdiction to actions based on the latter source. Certainly Randolph must have thought a national unwritten law to be operating, since he reported to Congress shortly after the 1789 Judiciary Act took effect that "the common law was . . . already the law of the United

<sup>153</sup> Letter from James Madison to George Washington (Oct. 18, 1787), *reprinted* in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 58, at 130 app. A.

<sup>154</sup> This would require "a digest of laws, instead of a Constitution," wrote Madison. *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 58, at 318.

<sup>157</sup> See 3 ELLIOT'S DEBATES, *supra* note 48, at 532 (Virginia Convention).

<sup>158</sup> This state of affairs would persist. See *The Common Law*, 19 N. AM. REV. 411, 437-38 (1824) ("The statute law is quite inconsiderable in comparison with the enormous mass of the common or unwritten law, that law of which the evidence is to be found in books of reports of the English and American courts, and the books made from them . . .").

States. Most probably this will be seldom, if ever, controverted."<sup>159</sup>

How can these remarks of Madison and Randolph be reconciled with their rejection of any general reception of the common law? The answer probably lies in an attitude, shared by others, toward the nature of federal jurisdiction. Delegates to the Convention had addressed the specific grants of jurisdiction, not the *form* of their exercise. Much as state constitutional conventions had left the duties of courts undefined, in the expectation that they would continue operating as always,<sup>160</sup> the Framers referred only to "[t]he judicial power of the United States."<sup>161</sup> They probably anticipated that federal courts would act in the way courts were accustomed to operating, "exercis[ing] all functions and powers which Courts were at that time in the judicial habit of exercising."<sup>162</sup> Congress could control the extent of lower court jurisdiction, and accordingly "that general sense of justice pervad[ing] the Union . . . would depend upon the wisdom of the legislatures who are to organize it . . . ."<sup>163</sup>

Still, this conception left unclear the extent to which the making of common law would occur, for example, in the exercise of admiralty or diversity jurisdiction. In addition, the status of such law with respect to the states was largely left open, despite Federalist denials that the supremacy clause would operate to make all federal law dominant. For instance, if a common-law commercial issue arose in a diversity case, could a federal court apply the rule that it thought controlled the issue, or must it follow the decisions of some state? If the former were the guiding principle, would this federal common law be binding on future state courts? Would the situation be different if the issue were one of admiralty—or equity?

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<sup>159</sup> E. RANDOLPH, JUDICIARY SYSTEM, H.R. DOC. NO. 17, 1st Cong., 3d Sess. (1790), reprinted in 1 AMERICAN STATE PAPERS: MISCELLANEOUS 25 (W. Lowrie & W. Franklin eds. 1834). Randolph nevertheless considered it important to state explicitly in section 34 of the Judiciary Act that the common law was in effect. He proposed an amendment: "and, moreover, that the common law, so far as the same be not altered by the supreme law, by the laws of particular States, or by statutes, shall also be a rule of decision." *Id.* at 33. No action was taken on the recommendation. For a discussion of Randolph's proposal, see Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1521-23 (1984).

<sup>160</sup> See *supra* notes 25-29 and accompanying text.

<sup>161</sup> U.S. CONST. art. III, § 1.

<sup>162</sup> C. WARREN, *supra* note 151, at 332; accord Note, *The Federal Common Law*, 82 HARV. L. REV. 1512, 1515-16 (1969).

<sup>163</sup> 4 ELLIOT'S DEBATES, *supra* note 48, at 258 (Charles Pinckney, South Carolina Convention).



## 2. Section 34 and "General Law"

The usual answer to these last questions has been that the Framers intended Congress to decide not only the scope of federal jurisdiction, but also the source of law to be used by the courts.<sup>164</sup> In any event, that has seemed the likely purpose of section 34 of the 1789 Judiciary Act, which declared that "the laws of the several states . . . shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply."<sup>165</sup> The "in cases where they apply" limitation in section 34, however, has long struck legal commentators as rendering the whole provision entirely circular—"almost perversely uninformative."<sup>166</sup>

Among lawyers of the period that we are investigating, section 34, notwithstanding its peculiar wording, appears to have generated very little controversy. In a recent study of this enactment, William Fletcher notes that it "was generally understood to be merely declaratory of existing law; that is, even if the section had never been enacted, the federal courts would have followed the local law of the states in cases where it applied."<sup>167</sup> For other cases, the rules of decision would come from what Fletcher labels "general law," that which "existed by common practice and consent among a number of sovereigns."<sup>168</sup> He illustrates this with the example of the law of marine insurance, demonstrating that federal courts, even when sitting in diversity, felt free to develop a general law of marine insurance, irrespective of local law on the subject.<sup>169</sup>

Justice Wilson, in his charge to the grand jury in *Henfield's Case*,<sup>170</sup> expounded this theory by distinguishing matters subject to "local laws" from those decided under "the law of nations" or "the law of merchants."<sup>171</sup> Far from being extraordinary, Wilson's view was shared by persons of diverse sympathies, such as St. George Tucker<sup>172</sup> and James Sullivan. The latter wrote in 1801:

<sup>164</sup> See, e.g., 1 J. GOEBEL, *supra* note 15, at 229.

<sup>165</sup> Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92 (current version at 28 U.S.C. § 1652 (1982)).

<sup>166</sup> Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797, 800 n.16 (1957); accord M. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 81 (1980); Note, *supra* note 162, at 1515.

<sup>167</sup> Fletcher, *supra* note 159, at 1527.

<sup>168</sup> *Id.* at 1517.

<sup>169</sup> See *id.* at 1554-75.

<sup>170</sup> 11 F. Cas. 1099 (C.C.D. Pa. 1793) (No. 6360).

<sup>171</sup> *Henfield*, 11 F. Cas. at 1107.

<sup>172</sup> See Tucker, *supra* note 43, at 424-30 note E.

It seems to be the opinion of the best writers, ancient and modern, that as contracts arose from commerce, they ought to be governed by the *jus gentium*, the law of nations, known and established over the commercial world. . . . There is no act of any particular legislature, for the recovery of money due on policies, bills of exchange, charter parties, freight, &c. but we find the same form of contract, the same manner of construction, and the same remedies, all over the world.<sup>173</sup>

Sullivan was exaggerating the actual uniformity of commercial law, but the idea of bringing the law of merchants under the rubric of the law of nations was accepted.<sup>174</sup> Similarly, the body of legal rules and principles that we now call the "law of conflict of laws" or "private international law" would have been included within the law of nations.<sup>175</sup>

Accordingly, Lord Mansfield could write, concerning a point of marine insurance law, that "[t]he mercantile law, in this respect, is the same all over the world."<sup>176</sup> By this he meant that merchants behaved similarly everywhere, and their practices would be applied universally to define norms of behavior.<sup>177</sup> Again, this may not have stated the actual truth of uniformity; rather, he referred to a process by which all courts were to investigate international customs and practices. Consistent with this view, Chief Justice Marshall would state in *Gibbons v. Ogden*<sup>178</sup> that the right to engage in commerce "derives its source from those laws whose authority is acknowledged by civilized men throughout the world."<sup>179</sup>

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<sup>173</sup> J. SULLIVAN, *THE HISTORY OF LAND TITLES IN MASSACHUSETTS* 352 (Boston 1801). Sullivan went on to give the example of rules for determining privity of contract:

These do not arise on the force of an act of Parliament, but from the nature of things. The idea, that an act of legislation can create a privity where there is none, is as absurd as it would be to suppose it could change the colour of substances, or the nature of animals.

*Id.* at 353.

<sup>174</sup> See Comment, *Rules of Decision in Nondiversity Suits*, 69 YALE L.J. 1428, 1443 n.113 (1960).

<sup>175</sup> Rheinstein, *The Constitutional Bases of Jurisdiction*, 22 U. CHI. L. REV. 775, 805 (1955).

<sup>176</sup> *Pelly v. Governor of the Royal Exch. Assurance*, 1 Burr. 341, 347, 97 Eng. Rep. 342, 346 (K.B. 1757).

<sup>177</sup> See Goebel, *Ex Parte Clio* (Book Review), 54 COLUM. L. REV. 450, 457-58 (1954) (reviewing W. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* (1953)).

<sup>178</sup> 22 U.S. (9 Wheat.) 1 (1824).

<sup>179</sup> *Id.* at 211.

Long before *Swift v. Tyson*<sup>180</sup> was decided, federal courts recognized the division between general and local law:<sup>181</sup> only if the issue fell under the latter heading was it considered necessary to follow the law of a particular state.<sup>182</sup> St. George Tucker explained this demarcation in 1803 by reference to

controversies between citizens of different states; and between citizens of any state and the subjects or citizens of foreign states . . . . In these cases, the municipal law of the place where the cause of controversy arises, whether that be one of the United States . . . or any other country; or the general law of merchants; or, the general law of nations according to the nature and circumstances of the case, must be the rule of decision, in whatever court the suit may be brought. Thus if a bond be given in Philadelphia, the rate of interest must be settled according to the laws of Pennsylvania. . . . If a ransom bill be drawn at sea, the law of nations in that case must be consulted. If the controversy relate to lands, the law of the state where the lands lie must be referred to; unless the lands be claimed under grants from different states; in which case the territorial rights of each state must be inquired into.<sup>183</sup>

Despite the early recognition of matters "general" as opposed to "local" in commentaries and opinions, there is scarcely a clear statement from that time as to the precise relationship between section 34 and the choice-of-law question. In looking at this statute, we expect to find some indication whether "general law" was within the category of cases in which state law did not "apply." That it was not so understood, or even discussed, in those terms is demonstrated by federal courts being obligated to follow state statutes regarding general law matters and "settled" constructions given the statutes by the state

<sup>180</sup> 41 U.S. (16 Pet.) 1 (1842).

<sup>181</sup> *Swift* "summed up prior attitudes and expressions in cases that had come before this Court and lower federal courts for at least thirty years, at law as well as in equity. The short of it is that the doctrine was congenial to the jurisprudential climate of the time." *Guaranty Trust Co. v. York*, 326 U.S. 99, 102-03 (1945); accord T. FREYER, *HARMONY & DISSONANCE: THE SWIFT & ERIE CASES IN AMERICAN FEDERALISM* 26-40 (1981); R. NEWMYER, *SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC* 338 (1985).

<sup>182</sup> See Fletcher, *supra* note 159, at 1534-38.

<sup>183</sup> Tucker, *supra* note 43, at 421 note E. During the Virginia ratification debates, John Marshall used similar examples in contending that federal courts in diversity cases would be obliged to follow state law under the principle of *lex loci*. See 3 ELLIOT'S DEBATES, *supra* note 48, at 556-57, 559.

courts.<sup>184</sup> As will be discussed below, a federal court's authority to make an independent interpretation of *general* law did not depend on its being considered a form of *federal* law. Instead, Story's thesis in *Swift* was based on the notion that unwritten law was something to be discovered and was merely evidenced by judicial opinions, irrespective of whether they were issued by state, federal, or foreign tribunals.<sup>185</sup>

Leaving those issues aside for the moment, the important point is that section 34 did not address what is now termed federal common law. In referring to admiralty cases, legal writers would not call the applicable unwritten law "federal." The typical attitude was that expressed by William Rawle: "[T]he whole system of maritime affairs with its connexions and dependencies is withdrawn from the several states by their own consent, and vested in the general government . . . ."<sup>186</sup> To us this sounds as if Rawle meant that admiralty law had been federalized. His point, however, was jurisdictional: only the federal courts could hear these kinds of cases. So too did Thomas Sergeant write that, when a federal court was "sitting as a court of

<sup>184</sup> See Fletcher, *supra* note 159, at 1534-38.

<sup>185</sup> To hold this view of unwritten law, Story did not necessarily have to embrace a natural law theory:

Whether Story literally believed that law predated cases, that deciding was discovering, is doubtful. . . . The interconnected nature of his opinions does however attest to his belief in law as science. . . . Holism was the key. Rules were systematically connected to principles. The common law was connected to constitutional law, and both were informed by the civil law—a process that should be informed by comparative law . . . and legal history . . . .

R. NEWMYER, *supra* note 181, at 113. In a "scientific" approach, law was discovered in the sense that the jurist was required to expound the logical connections between cases. That Story would use decisions and commentaries from a variety of legal systems attests at least to a faith in the ability of human reason to produce consistent results through systematic investigation. But here lies a great unresolved tension in Story's thought. His treatise on the conflict of laws was premised on the assumption that the laws of different states would conflict due to the varying conditions among the states. See J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS 1-2 (3d ed. Boston 1846) (1st ed. Boston 1834). Resolving conflicts was to Story the business of "private international law," *id.* at 13, and the purpose of his book was to urge that "some common principles [be] adopted by all nations" to form an international body of conflicts principles. These principles applied to matters clearly "general" in the *Swift* formulation, such as contracts, *see id.* at 362-63, 367-68, 399, 401, 414-16, 429-32, 580-81, and negotiable instruments, *see id.* at 513-14, 947-48. Presumably Story reconciled the existence of conflicting laws with his ideas of "scientific" law by assuming that "variances" resulted sometimes "from accident . . . sometimes from superior skill . . . and sometimes from a choice founded in ignorance, and supported by the prejudices of imperfect civilization." *Id.* at 1. But even he recognized that conflicts occurred at times "from design . . . and knowledge of local interests," *id.*, an acknowledgement that devastated the concept of law as science.

<sup>186</sup> W. RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 202 (2d ed. Philadelphia 1829) (1st ed. Philadelphia 1825).

Equity or Admiralty," section 34 was irrelevant since it referred only to "trials at common law."<sup>187</sup>

As is well known, the regime of general law ultimately collapsed under the weight of two irresolvable pressures. First, the demarcation between general and local law became increasingly muddled. Second, state courts persisted in their own interpretations of general law, defeating the goal of uniformity that Madison had advanced in defense of article III. These developments were not simply happenstance. They reflected a basic weakness in the prevailing theory of federal jurisdiction, one traceable to a more fundamental inadequacy in the conception of constitutionalism.

### 3. The Irrelevance of "Federal Common Law" to Federal Jurisdiction

Article III was a grant of jurisdiction with the potential for reaching the totality of litigation that the Framers regarded as important to the nation. William R. Davie emphasized to the North Carolina convention that "the general judiciary ought to be competent to the decision of all questions which involve the general welfare or peace of the Union."<sup>188</sup> It was an "obvious consideration," said Hamilton, that there be a method of "giving efficacy to constitutional provisions," in order "to restrain or correct the infractions of them" on the part of states.<sup>189</sup> Equally plain was the need for an authority to provide "uniformity in the interpretation of the national laws," which necessitated "the judicial power . . . being coextensive with [the] legislative."<sup>190</sup> Federal judicial power was also seen to be "[t]he only means . . . of enforcing obedience to the legislative authority."<sup>191</sup> Well versed in the enforcement problems plaguing the national government under the Articles of Confederation, Madison urged that "[c]ontroversies affecting the interest of the United States ought to be determined by their own judiciary, and not be left to partial, local tribunals."<sup>192</sup>

National judicial affairs were not limited to enforcing and interpreting federal statutes and the Constitution. Diversity, admiralty, and

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<sup>187</sup> T. SERGEANT, CONSTITUTIONAL LAW 148 (2d ed. Philadelphia 1830) (1st ed. Philadelphia 1822).

<sup>188</sup> 4 ELLIOT'S DEBATES, *supra* note 48, at 158.

<sup>189</sup> THE FEDERALIST No. 80, *supra* note 59, at 535.

<sup>190</sup> *Id.*

<sup>191</sup> 4 ELLIOT'S DEBATES, *supra* note 48, at 158 (William R. Davie, North Carolina Convention).

<sup>192</sup> 3 *id.* at 532 (Virginia Convention); *accord* 4 *id.* at 145-46 (James Iredell, North Carolina Convention) ("At present, Congress have powers which they cannot execute.").

maritime grants, for example, covered all commerce of national significance, since most important trade crossed state lines and was by sea.<sup>193</sup> Madison explained to the Virginia convention that these jurisdictional grants, along with those concerning ambassadors, foreign ministers, and treaties, would result in a uniformity of decision that was critically important "[a]s our intercourse with foreign nations will be affected by decisions of this kind."<sup>194</sup> Here two elements combined. First, "the denial of justice" to foreigners was considered "by all writers" to be "one of the just causes of war."<sup>195</sup> To avoid this danger, Hamilton wrote, "it is by far most safe and most expedient to refer all those in which [foreigners] are concerned to the national tribunals."<sup>196</sup> Hamilton commented that "[a] distinction may perhaps be imagined between cases arising upon treaties and the laws of nations, and those which may stand merely on the footing of municipal law."<sup>197</sup> Although the "former kind may be supposed proper for the federal jurisdiction, [and] the latter for that of the states," Hamilton doubted that this distinction would be appreciated abroad:

But it is at least problematical, whether an unjust sentence against a foreigner, where the subject of controversy was wholly relative to the *lex loci*, would not, if unredressed, be an aggression upon his sovereign, as well as one which violated the stipulations in a treaty or the general law of nations.<sup>198</sup>

A second reason for providing a federal forum to foreigners was to encourage their commercial intercourse with this country. "We well know," Madison remarked, "that foreigners cannot get justice done them in these [state] courts, and this has prevented many wealthy gentlemen from trading or residing among us."<sup>199</sup> Encouraging commerce by this means applied equally to relations among American entrepreneurs in different states, who had been hampered by "tardy, and even defective, administration of justice . . . in some states."<sup>200</sup> Many of the Framers looked forward to a tremendous, if undefined, expansion of

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<sup>193</sup> See L. FRIEDMAN, *supra* note 29, at 228; Stolz, *Pleasure Boating and Admiralty: Erie at Sea*, 51 CALIF. L. REV. 661, 671-73 (1963).

<sup>194</sup> 3 ELLIOT'S DEBATES, *supra* note 48, at 532; *accord id.* at 570-01 (Edmund Randolph, Virginia Convention).

<sup>195</sup> 4 ELLIOT'S DEBATES, *supra* note 48, at 159 (William R. Davie, North Carolina Convention).

<sup>196</sup> THE FEDERALIST No. 80, *supra* note 59, at 536.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> 3 ELLIOT'S DEBATES, *supra* note 48, at 583 (Virginia Convention).

<sup>200</sup> *Id.* at 533 (James Madison, Virginia Convention).

trade and manufacture, which they thought could flourish only under a regime of stable, predictable commercial law.<sup>201</sup> Diversity jurisdiction afforded both a neutral forum and the possibility of consistent judicial procedures.<sup>202</sup> It is also reasonable to conclude that diversity was expected to protect against erroneous choices of law by biased state courts.<sup>203</sup>

"Harmony between the states is no less necessary than harmony between foreign states and the United States," Edmund Randolph reminded the Virginia Convention.<sup>204</sup> He highlighted several border disputes of the day that had produced threats of military confrontation and actual reprisals from the state governments involved. Border disputes were not the only possible source "from which bickerings and animosities [could] spring up among members of the Union," Hamilton wrote, since "the spirit which produced them will assume new shapes that could not be foreseen, nor specifically provided against."<sup>205</sup> As proof that state law could not govern such controversies, he referred to "fraudulent laws which have been passed in too many of the states."<sup>206</sup> In modern terminology, the law applicable to most such relationships among states would be federal common<sup>207</sup> or constitutional

<sup>201</sup> See Frank, *Historical Bases of the Federal Judicial System*, 13 LAW & CONTEMP. PROBS. 3, 27 (1948).

<sup>202</sup> See 1 J. GOEBEL, *supra* note 15, at 233 n.187. Achieving uniform rules of procedure was long frustrated, however, by the Process Acts in effect before 1872, Act of Sept. 29, 1789, ch. 4, 1 Stat. 93; Act of May 8, 1792, ch. 36, 1 Stat. 275; Act of July 22, 1813, ch. 14, 3 Stat. 19; Act of Mar. 3, 1821, ch. 51, 3 Stat. 643; Act of May 19, 1828, ch. 68, 4 Stat. 278, and by the Conformity Act in effect from 1872 to 1938, Act of June 1, 1872, ch. 255, 17 Stat. 19. These acts required federal courts to follow the forum state's procedures in common-law cases. See Hill, *The Erie Doctrine and the Constitution—Part II*, 53 NW. U.L. REV. 541, 596 (1958).

<sup>203</sup> See R. BRIDWELL & R. WHITTEN, *THE CONSTITUTION AND THE COMMON LAW: THE DECLINE OF THE DOCTRINES OF SEPARATION OF POWERS AND FEDERALISM* 30-31 (1977). While federal courts prior to *Erie* could engage in independent choice-of-law determinations, see McCormick & Hewins, *The Collapse of "General" Law in the Federal Courts*, 33 ILL. L. REV. 126, 138 (1938), they are now obliged to honor the selection of nonfederal law that a court of the forum state would make. See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941).

<sup>204</sup> 3 ELLIOT'S DEBATES, *supra* note 48, at 571; accord THE FEDERALIST No. 80 (A. Hamilton), *supra* note 59, at 536.

<sup>205</sup> THE FEDERALIST No. 80, *supra* note 59, at 537.

<sup>206</sup> *Id.* at 537. Hamilton was probably referring to "fraudulent" debt relief laws of various states; diversity jurisdiction was expected, said Edmund Pendleton, "to stop [their] pernicious effects." 3 ELLIOT'S DEBATES, *supra* note 48, at 549 (Virginia Convention); see also *id.* at 534-35 (James Madison, Virginia Convention); 4 *id.* at 159 (William R. Davie, North Carolina Convention). Most likely these speakers assumed that the federal courts would achieve this end by applying the contract clause of article I, section 10. Pendleton referred to "[p]aper money and tender laws" as being "in opposition to the federal principle, and restriction of this Constitution." 3 *id.* at 549 (Virginia Convention).

<sup>207</sup> See, e.g., *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S.

law.<sup>208</sup> In the era studied here, "federal common law" was not a meaningful term.

Federal courts were to achieve the purposes set out for them by the Framers through their mere availability to litigants. A federal forum, it was asserted, would eliminate the various forms of bias that typified state tribunals. Related discussions concerning the need for uniform application of federal law centered on the Constitution, congressional statutes, and general law of the transnational variety. Conversants viewed the last of these as an understood body of existing principles, or at least a jurisprudence capable of being understood through the exercise of reason. Irrespective of whether lower federal courts were created, the Supreme Court would serve as the mechanism for insuring uniformity of interpretation of the general law in areas considered important to the national welfare. Further, the device of exclusive federal jurisdiction over selected areas provided a means of avoiding diverse state rulings.

One can easily see how this arrangement would seem useful for resolving a series of pressing and pragmatic concerns. However, a hard question had been raised during ratification, and it involved the sources of law for the future federal courts. But the context in which the point arose allowed Federalists easily to dismiss the issue. When it was argued that, in a diversity case, state law might be ignored in favor of a uniform national law, the answer was simple. The federal government had only a few, narrowly constrained powers, which obviously would not extend to any matter "internal" to the states. For cases involving general law, it was assumed that state courts were already obliged to follow a transnational jurisprudence.<sup>209</sup> Accordingly, the new federal judicial powers could not impinge upon the states. Section 34 of the 1789 Judiciary Act,<sup>210</sup> interpreted as merely setting forth a principle that would be valid even if the statute were not in existence, was an expression of this understanding of states' rights.<sup>211</sup>

92, 110 (1938) (asserting that "whether water of an interstate stream must be apportioned between . . . two States is a question of 'federal common law'").

<sup>208</sup> Likely candidates would be the contract clause or the dormant commerce clause. The latter is essentially a species of federal common law. See J. ELY, *DEMOCRACY AND DISTRUST* 187 n.13 (1980).

<sup>209</sup> See Note, *Federal Common Law and Article III: A Jurisdictional Approach to Erie*, 74 *YALE L.J.* 325, 334 (1964).

<sup>210</sup> Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92 (current version at 28 U.S.C. § 1652 (1982)).

<sup>211</sup> Thomas Sergeant stated the constitutional compulsion behind section 34:

Indeed, Congress cannot constitutionally impair the obligation of laws passed by the states, by setting up a different rule of decision in relation to contracts, property real and personal, &c., when such state laws are not



What commenced the downfall of this model of judicial authority was the perception that the Federalists of the late 1790's had expanded the extent of federal powers at the expense of the states. It may be that the failure to include a provision comparable to section 34 in the 1801 Judiciary Act<sup>212</sup> was designed by Federalists to facilitate future expansive assertions of common-law jurisdiction by federal courts. Yet the lack of recorded controversy over that move, in contrast to the sharp clashes over the very existence of common-law jurisdiction, makes it plausible that section 34 was regarded as simply unnecessary.

In any event, it was not any ambiguity peculiar to section 34 that created the confrontation over federal jurisdiction. More basic than any statutory enactment was a fundamental disagreement over what powers the Constitution assigned to the federal establishment. As a consequence of this dispute, and the way in which it was played out against the prevailing philosophies of law and sovereignty, there never developed a comprehensive theory of federal jurisdiction that might justify the federal courts' exercise of a common-law jurisdiction, and the creation of a distinctive nonstatutory, nonconstitutional law that would be binding on the states.

Several themes coalesce to explain this lack of development. The first, relating to the view that law of the unwritten variety was "found," and thus not the product of a sovereign's exercise of power, is examined in the following subsection. Intertwined with the idea of general law, this theory helps explain how the Framers and their contemporaries could have supposed that an extensive federal jurisdiction would be exercised without interfering with the states' sovereignty. A second theme, involving the prevailing theory of territorial sovereignty, and the way that it impeded the formulation of an uniquely federal common law, is discussed in the subsequent subsection.

#### a. *The Idea of Law as Distinct from Sovereign Interests*

Although concerns over judicial lawmaking were voiced as early as *Henfield*, there were at the same time ready responses. When presented with the charge that, under the proposed Constitution, the "laws may be executed tyrannically," John Marshall had replied to the Virginia Convention: "Where is the independency of your judges? If a law be

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repugnant to the constitution and laws of the United States. The powers vested in Congress are limited, and were not intended to interfere with these powers, as vested in the state governments.

T. SERGEANT, *supra* note 187, at 150.

<sup>212</sup> Judiciary Act of 1801, ch. 4, 2 Stat. 89, *repealed by* Act of Mar. 8, 1802, ch. 8, § 1, 2 Stat. 132, 132.

exercised tyrannically in Virginia, to what can you trust? To your judiciary. What security have you for justice? Their independence. Will it not be so in the federal court?"<sup>213</sup> Madison used a different approach to counter objections to the exercise of diversity jurisdiction: "Were I to select a power which might be given with confidence, it would be judicial power. This power cannot be abused, without raising the indignation of all the people of the states."<sup>214</sup>

Marshall's faith in judicial independence and Madison's reliance on popular restraint of judges were conflicting stances, and by the first decade of the nineteenth century, judicial independence would in fact collide with popular sentiments. When such sentiments were uttered, the conflict—to the extent that people perceived it—was not as important as the assurance that one or both mechanisms would check judicial abuse. Provided the abuses were easily recognizable, as the Federalists assured, one might consistently claim that judges would be insulated from pressures to exceed their authority, and simultaneously hold public censure out as a corrective measure. But abuse of judicial office turned out not to be a plain concept, at least when the behavior in question fell short of obvious excesses, such as conducting biased trials.

From *Henfield* through the sedition prosecutions of the late 1790's, a far more subtle development strengthening the federal judicial lawmaking power was under way. Involved in the sedition cases was the federal government's assertion of a sovereign interest in seeing that the defendants were convicted. In developing unwritten principles to accomplish this end, the federal courts at times drew upon the general law of nations. Nevertheless, it was the national interest that justified the exercise of power. A Gideon Henfield could not be deprived of liberty merely for violating the law of nations—there was no international government that could accuse him. The theory was rather that his transgression of the law of nations threatened the domestic peace, and thereby constituted a violation of United States law.

The proposition that the federal government could develop unwritten law to vindicate its own interests was not difficult to maintain. It had long been recognized that sovereign states possessed the power of self-protection. James Sullivan had no trouble writing that

[a]nimals, of every description, are armed with the means of self defence; and it must be a miserable government, which has not the means of defending itself from insults and injury. . . . Every power, necessary to the maintenance of the

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<sup>213</sup> 3 ELLIOT'S DEBATES, *supra* note 48, at 559.

<sup>214</sup> *Id.* at 535 (Virginia Convention).

government against invaders of every description, in the civil line, may be exercised by the national judicial power. Should it be said that the judiciary is to wait, until the Legislature shall make laws, the answer is, that this would be placing the question, whether the government should, or should not, exist in the Congress alone.<sup>215</sup>

This position was susceptible to broad interpretations. Governments do not exist merely for the sake of their own preservation, particularly if one accepts that sovereignty resides in the people. Instead, those who happen to be in power are charged with attending to the concerns of those who employ them. Between the time of the Revolution and the adoption of the Constitution, this citizen-sovereign relationship existed only with respect to state governments, which possessed the full range of sovereign powers. Behind the legislation of these states was, John Marshall wrote, a "substratum"<sup>216</sup> of unwritten law formed from "the common law of England [which] was, and is, the common law of this country."<sup>217</sup> In the federal structure created by the Constitution, on the other hand, sovereign powers are distributed between two levels of government. Consequently, in constructing a theory of federal judicial power one might view the national government itself as having been formed against the background of this same "substratum" of unwritten law. The content of that background would depend on the subjects designated as within federal competence by the initial constitutional delegation. As the following remarks of James Sullivan indicate, this theory of federal judicial power was held by some at the end of the eighteenth century:

But the great end, for which the government is constituted, is expressed in the preamble [of the Constitution,] and whatever is there expressed, is the common law of the whole country; because, that though it is not written at large, or

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<sup>215</sup> J. SULLIVAN, *supra* note 173, at 344-45. Justice Paterson's justification for common-law crimes was that "[t]he principles of self defence and preservation, which pervades [sic] nations, as well as individuals, renders [sic] the punishment of offences an indispensable requisite in every government." W. Paterson, *supra* note 76, at 565.

<sup>216</sup> R. FAULKNER, *THE JURISPRUDENCE OF JOHN MARSHALL* 59-60 (1968) (quoting 2 D. ROBERTSON, *REPORTS OF THE TRIALS OF COLONEL AARON BURR* 402 (Philadelphia 1808)).

<sup>217</sup> *Murdock v. Hunter*, 17 F. Cas. 1013, 1015 (C.C.D. Va. 1808) (No. 9941). To Marshall, the common law was an "ancient permanent and approved system," *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 47 (1825), "which is really human reason applied by courts, not capriciously, but in a regular train of decisions, to human affairs, according to the circumstances of the nation, the necessity of the times, and the general state of things . . ." *Livingston v. Jefferson*, 15 F. Cas. 660, 663 (C.C.D. Va. 1811) (No. 8411) (Marshall, C.J., concurring).

formally enacted, it is declared to be the public mind, that those principles shall be the law of the nation.<sup>218</sup>

It should be stressed that Sullivan's opinion was not universally held,<sup>219</sup> especially by those who thought it outrageous to define federal authority in terms of the Constitution's preamble, rather than the specifically enumerated powers. Had Sullivan's argument been followed to its logical conclusion, an entirely different theory of federal judicial jurisdiction might have emerged. A federal court, in fashioning a common-law decision, would not be limited to selecting between "general" or "local" law in exercising its constitutionally and statutorily defined jurisdiction. A decision could rest instead on a distinctively federal common law, on the theory that a federal interest so required. Having the force of federal sovereignty behind them, the resulting federal common-law principles would be binding on state judiciaries. The United States Supreme Court would have constitutional power to review state court decisions on matters appropriately governed by federal common law.

Nothing like the theory of jurisdiction just articulated was generally accepted until far into the nineteenth century.<sup>220</sup> The subsequent development of federal common law would require a conceptual departure from the theories of jurisdiction prevalent in the pre-*Hudson* period. Retarding this eventual breakthrough was the legacy of that earlier time, when it had been necessary to adapt the existing theory about common-law powers to an unprecedented federal judicial system. Under the formulations of the Framers, the interests of the federal government were not thought to require the creation of a distinctive *federal* law. Matters of general law possessed by definition a transnational

<sup>218</sup> J. SULLIVAN, *supra* note 173, at 345.

<sup>219</sup> The author of *Trial of William Butler for Piracy* (1813) [original pamphlet in Harvard Law School Library; copy on file with the *University of Pennsylvania Law Review*], apparently Justice Johnson, *see* Jay, *Part One*, at note 49, expressly rejected the contention "that the criminal Common Law jurisdiction results to [the federal government] from necessity to enable it to protect itself." *Trial of William Butler for Piracy*, *supra*, at 19.

<sup>220</sup> It was well established that an issue of general common law presented no federal question for purposes of the Supreme Court's jurisdiction. *See, e.g.,* *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590, 638 (1874); *Delmas v. Insurance Co.*, 81 U.S. (14 Wall.) 661, 665-66 (1871) (dictum); Hill, *The Erie Doctrine in Bankruptcy*, 66 HARV. L. REV. 1013, 1026 (1953). Nonetheless, federal courts in the latter part of the 1800's began to formulate a type of common law that *was* considered to present a federal question and *did* bind state courts. This practice occurred, for example, in cases involving interstate carriers. *See* Von Moschzisker, *The Common Law and Our Federal Jurisprudence* (Part 3), 74 U. PA. L. REV. 367, 380 (1926); *cf.* Hill, *The Law-making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024, 1029 n.30 (1967) (collecting cases from the early 1900's [hereinafter cited as Hill, *Law-making Power*]).

character, while local law was identifiable with the range of concerns that the Framers indicated would remain "internal" to the states. There were no other categories into which to fit a common law that might be "local" to the *federal* government, unless the matter arose within the jurisdiction of a federal territory, such as the District of Columbia.

A clear indication of this early theoretical framework comes from the supremacy clause of the Constitution, which was not designed to apply to common-law cases: "This Constitution, and the Laws of the United States which shall be *made* in Pursuance thereof; and all Treaties *made*, or which shall be *made*, under the Authority of the United States, shall be the supreme Law of the Land . . . ."<sup>221</sup> For the same reasons that the Constitution could not have contained a general reception clause for the common law, the supremacy clause could not have made a reference to unwritten law that would be binding on the states. Moreover, it would have made no sense to do so. General common law was already "binding" on the states by the very nature of its transnational character; local common law naturally was entirely the affair of a particular jurisdiction.

Federal jurisdiction was created in large part to ensure that interpretations of this general law were uniform and were not applied prejudicially. To advance this end Congress was authorized to grant the federal courts exclusive jurisdiction over certain areas. Not surprisingly, the 1789 Judiciary Act made admiralty an exclusive federal area and provided access to the national courts for a significant number of suitors who might have a question of general law to be litigated.<sup>222</sup>

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<sup>221</sup> U.S. CONST. art. VI (emphasis added). Some commentators doubt the significance of the word "made" in article VI and advance arguments such as this: "[The Framers] intended the 'law of nations' to be applied with binding force by the federal courts although this law was judge-made." Note, *supra* note 162, at 1514 (footnote omitted). Supporting the view that the "law of nations" was to be "binding" is the "wealth of evidence attest[ing] the framers' belief that the federal government should have exclusive power to deal with foreign affairs." *Id.* at 1521 (footnote omitted). Although the Framers did hold this belief, the overall argument neglects the fact that the Framers meant to utilize the device of exclusive federal *jurisdiction* to accomplish federal dominance over foreign affairs.

<sup>222</sup> Section 9 of the Act conferred exclusive federal jurisdiction over civil admiralty and maritime cases, allowing for "a common law remedy, where the common law is competent to give it." Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77 (codified as amended in scattered sections of 28 U.S.C.). The Act also allowed an alien to sue in federal court "for a tort only in violation of the law of nations or a treaty of the United States." *Id.* Under the same section, the United States could bring a common-law suit in its own name in federal court, if the amount in dispute was at least \$100. Further, most cases against "consuls or vice-consuls" would be heard exclusively in federal court. *Id.* Diversity jurisdiction was set up by section 11, and included cases involving alien parties. *Id.* at 78-79. Section 12 ensured that diversity cases in which the states

Given this conceptual setting, one can readily understand why the storm over federal common law broke in the context of criminal cases. For a considerable period in early American judicial history, the federal courts were free to develop a common law for civil cases, particularly in the commercial field, without provoking serious objections of the sort raised in *Hudson*. In cases depending on general law, these courts could apply law drawn from all the familiar sources recognized in Great Britain. Federal courts often relied on principles of English law without explicitly citing them.<sup>223</sup> Those cases falling under equity jurisdiction were not even within the terms of section 34, and thus British Chancery practice was the primary reference.<sup>224</sup> Even for cases based on local law, "the conception of the common law as in essence a body of principles had its effects."<sup>225</sup> A point that Marshall often made was that all of the states' "distinct systems . . . originat[ed] in the same great principles."<sup>226</sup> This philosophy, Julius Goebel maintained, explains Marshall's "pronounced . . . preference for statements in terms of principle; why throughout his tenure it is upon the English sources that he places first reliance."<sup>227</sup> Moreover, "[o]n the common law side, it was impossible to conduct any disputation on any proposition of law in a nation of lawyers trained in the common law, no matter how variegated the version prevailing in any state, without recourse to sources in general use."<sup>228</sup>

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were given concurrent jurisdiction could be removed to federal court. *Id.* at 79-80. Although there was a \$500 "amount in controversy" requirement for diversity cases, that would not have precluded any case of significance—the ones likely to provoke the concerns articulated by the Framers. In section 13, the Supreme Court was given exclusive original jurisdiction over civil cases "where a state is a party, except between a state and its citizens; and except also between a state and citizens of other states, or aliens, in which latter case it shall have original but not exclusive jurisdiction." *Id.* at 80. In addition, the Supreme Court was given exclusive jurisdiction in cases "against ambassadors, or other public ministers . . . consistently with the law of nations; and original, but not exclusive jurisdiction of all suits brought by ambassadors, or other public ministers, or in which a consul, or vice consul, shall be a party." *Id.* at 80-81.

<sup>223</sup> T. FREYER, *supra* note 181, at 36; *see, e.g.*, *Boyce v. Anderson*, 27 U.S. (2 Pet.) 150 (1829); *Coolidge v. Payson*, 15 U.S. (2 Wheat.) 66 (1817).

<sup>224</sup> *See* Eliot, *supra* note 12, at 513; *see also* *United States v. Howland*, 17 U.S. (4 Wheat.) 108, 115 (1819) (priority in bankruptcy).

<sup>225</sup> 1 THE LAW PRACTICE OF ALEXANDER HAMILTON, *supra* note 27, at 34.

<sup>226</sup> *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 46 (1825).

<sup>227</sup> Goebel, *supra* note 38, at 118.

<sup>228</sup> 1 THE LAW PRACTICE OF ALEXANDER HAMILTON, *supra* note 27, at 34. State and lower federal courts typically relied on English law, both substantive and procedural—notwithstanding public outcries during this era about the inappropriateness of so doing. *See supra* notes 25-29 and accompanying text. Professor Tachau succinctly explains why: "Where else would lawyers and judges who had been educated in the traditions of English law look for precedents and procedures but in English sources?" M. TACHAU, *supra* note 25, at 93.

Considering all this, it is not remarkable that the Supreme Court failed to construe section 34 until 1825, when Marshall referred to it as "the recognition of a principle of universal law; the principle that in every forum a contract is governed by the law with a view to which it was made."<sup>229</sup> But state law in the early nineteenth century, particularly that applicable to commercial transactions, was usually "unsettled or not to be found,"<sup>230</sup> owing in large measure to the lack of familiarity of those courts with commercial matters.<sup>231</sup> By contrast, the federal courts gained important expertise in business cases (including those involving complicated real property questions) coming within the diversity jurisdiction. And the District of Columbia, situated in an expanding commercial zone,<sup>232</sup> became a major forum for cases involving marine insurance, negotiable instruments, insolvency, and real property.<sup>233</sup> Since the District was a federal entity, courts there could go about the task of constructing a common law unimpaired by considerations of states' rights.<sup>234</sup> Between 1801 and 1815, District of Columbia cases constituted thirty-five percent of the Supreme Court's appellate docket.<sup>235</sup> During the same period, only 4.5% came from state courts.<sup>236</sup>

That criminal cases provided the moment for a general assault on federal common-law jurisdiction was somewhat fortuitous. Had the Federalists managed to parlay their brief surge of popularity following the XYZ affair<sup>237</sup> into a successful bid in the 1800 elections, matters might have been different. One possibility is that the 1801 Judiciary Act, including its expansive provisions for jurisdiction over federal questions, would have remained in force for a while. A federal court not situated in the District of Columbia might conceivably have been presented with a case involving nondiverse parties, with a subject matter not within another explicit article III grant of jurisdiction, such as admiralty, in which the plaintiff's claim rested on an alleged common-law right. For example, the issue might have been a commercial law

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<sup>229</sup> *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 48 (1825).

<sup>230</sup> 1 J. GOEBEL, *supra* note 15, at 655.

<sup>231</sup> See Frank, *supra* note 201, at 26.

<sup>232</sup> See H. JOHNSON, *FOUNDATIONS OF POWER: JOHN MARSHALL, 1801-1815 (PART TWO)* 378 (1981).

<sup>233</sup> See *id.* at 620.

<sup>234</sup> A consequence of the District's status was that persons there could be charged with common-law offenses. See *United States v. Watkins*, 3 D.C. (3 Cranch) 441, 452 (1829). This apparently is still true. See *United States v. Davis*, 167 F.2d 228, 229 (D.C. Cir.), *cert. denied*, 334 U.S. 849 (1948); *Logan v. United States*, 483 A.2d 664, 675 n.17 (D.C. 1984).

<sup>235</sup> See H. JOHNSON, *supra* note 232, at 378.

<sup>236</sup> See *id.*

<sup>237</sup> See L. BANNING, *THE JEFFERSONIAN PERSUASION: EVOLUTION OF A PARTY IDEOLOGY* 253-54 (1978).

question that ordinarily would have been decided under the general law of merchants. The federal courts would then have been obliged to rule on whether article III encompassed a common-law jurisdiction based on the nature of the subject involved. Given the development of jurisdictional theory at this stage in our history, we may surmise that the issue would have been resolved against the plaintiff, for the court would have been hard pressed to explain on what theory the case fell within the article III grant of jurisdiction.

Mercantile law, referred to as the law merchant, provides a good illustration of how a "general" law could not have been considered one of the "laws of the United States" for purposes of jurisdiction. Due to its supposedly international character, the law merchant was often treated by English legal writers as distinct from the common law of England.<sup>238</sup> As a consequence, the works of foreign jurists were utilized by courts in the development of the law merchant.<sup>239</sup> Nevertheless, the law merchant was considered a part of English law; Blackstone wrote that the law merchant, "however different from the general rules of the common law, is yet ingrafted into it, and made a part of it."<sup>240</sup> Justice Wilson likewise offered the law merchant as an instance in which the common law had received another system by "a friendly correspondence."<sup>241</sup> In part these expressions meant that the common-law courts had taken jurisdiction over cases that previously were decided under the law merchant by other English courts (such as chancery and the court of admiralty).<sup>242</sup> Another side of the matter was the conscious effort, most noticeable during the tenure of Lord Mansfield as Chief Justice of the King's Bench (1756-1788), to formulate the law merchant as a comprehensive body of rules reflecting the needs of merchants, unencumbered by the technicalities of the common law.<sup>243</sup> Mansfield employed and consulted special mercantile juries,<sup>244</sup> and allowed evidence of customs to settle controversies by recognizing them as binding rules

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<sup>238</sup> See Adler, *Business Jurisprudence*, 28 HARV. L. REV. 135, 139 n.18 (1914); Burdick, *What is the Law Merchant?*, 2 COLUM. L. REV. 470, 477-78, 482 (1902). See generally D. ROBERTSON, *ADMIRALTY AND FEDERALISM* 63 (1970).

<sup>239</sup> See F. KEMPIN, *LEGAL HISTORY* 90-91 (1963); Burdick, *supra* note 238, at 481-82; Scrutton, *General Survey of the History of the Law Merchant*, in 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 7, 14 (E. Freund, W. Mikell & J. Wigmore eds. 1909).

<sup>240</sup> Tucker, *supra* note 43, at 75.

<sup>241</sup> *Henfield*, 11 F. Cas. at 1107.

<sup>242</sup> See H. JOHNSON, *THE LAW MERCHANT AND NEGOTIABLE INSTRUMENTS IN COLONIAL NEW YORK 1664-1730*, at 37-39 (1963); Burdick, *supra* note 238, at 478-80; Holdsworth, *The Development of the Law Merchant and Its Courts*, in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY, *supra* note 20, at 289, 326-31.

<sup>243</sup> See Burdick, *supra* note 238, at 482.

<sup>244</sup> See Scrutton, *supra* note 239, at 14.



in cases in which the law was uncertain.<sup>245</sup>

In deciding whether the law merchant was a law of the United States for jurisdictional purposes, a federal court would have confronted the accepted understanding that the law merchant was, notwithstanding the grand claims of transnational uniformity, the law of particular sovereigns. It might be unobjectionable for a federal court in diversity cases to treat the law merchant as "general" in deciding choice-of-law questions, and thereby to ignore what state courts had held on the questions involved. To assert that the law merchant constituted "Laws of the United States"<sup>246</sup> for article III jurisdiction would have provoked the same forces that opposed a federal common law of sedition on grounds of interference with state sovereignty.<sup>247</sup> Inasmuch as it would have been absurd then to suggest that Congress had authority to legislate as to purely intrastate commercial transactions, creating a common-law authority in the same area would have been perceived as a usurpation of states' rights. The conflict with the states would have been, if anything, more acute than it was with the exercise of jurisdiction over common-law crimes. Because state courts had concurrent jurisdiction with the federal courts in most civil cases, the Supreme Court could have reviewed questions of common law from state courts that were "Laws of the United States" under the 1801 Judiciary Act.<sup>248</sup>

#### b. *Theories of Sovereignty and Federal Jurisdiction*

One can easily imagine, then, that the Supreme Court that decided *Hudson*—or perhaps even a Supreme Court with a majority of Federalist personnel—would have adopted a limited view of federal common-law jurisdiction had it been presented with a civil case of the type just supposed. It might be argued that criminal cases with partisan overtones presented unique possibilities for public reaction, and the political

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<sup>245</sup> See F. KEMPIN, *supra* note 239, at 97-98; D. ROBERTSON, *supra* note 238, at 62-63; Scrutton, *supra* note 239, at 13-14.

<sup>246</sup> U.S. CONST. art. III, § 2.

<sup>247</sup> Federal jurisdiction was never based solely on the law merchant's effect on interstate commerce. See *Miller, Swift v. Tyson and Some Considerations of Philosophy in American Law*, 11 MISS. L.J. 243, 258 (1939).

<sup>248</sup> That a case involved general commercial law was never deemed sufficient to confer appellate jurisdiction on the Supreme Court. Cf. T. FREYER, *supra* note 181, at 39-40 ("[N]o one imagined that federal judges possessed authority over state courts, any more than state judges had the power to instruct their brothers on the federal bench."). Early commentators expressed regret over this fact, because it was considered an impediment to achieving uniformity in commercial law. Nevertheless, it was assumed that a constitutional amendment was needed to give the Supreme Court jurisdiction over all commercial cases. See, e.g., Wallace, *Remarks Upon Uniformity in Commercial Law*, 1 HAZARD'S U.S. COM. & STATISTICAL REG. 53, 54 (1839).

climate encouraged the warping of jurisdictional argument. But the argument justifying common-law jurisdiction was actually stronger for criminal than for civil actions. William Rawle, who had been the Federalist United States Attorney in *Henfield*, wrote in 1829 that a government's authority to prosecute criminals was founded upon "the law of nature, the usual appellation of the common law."<sup>249</sup> Prior to the Constitution, Rawle continued, crimes at common law were punishable by the states; however, when the Constitution was adopted certain criminal cases "were either expressly or by implication withdrawn from the immediate cognizance of the states."<sup>250</sup> In those fields where federal authority now supplanted that of the states, "[t]he people possessed . . . the full right to the punishment of offences against the law of nature, though they might not be the subject of positive law."<sup>251</sup> While particular criminal cases might arise under the Constitution, as a consequence of its being "the formation of a new and peculiar association,"<sup>252</sup> the same could not be said in the civil context. Rawle concluded that "[o]f a civil nature nothing can properly be said to *arise* under the Constitution, except contracts to which the United States are parties."<sup>253</sup>

Why would Rawle pick out contracts involving the United States and crimes as the only instances of common-law cases in which the Constitution itself furnished jurisdiction? His premise was that "controversies in which states and individuals of certain descriptions are concerned," namely cases falling under all the other article III heads of jurisdiction, "would exist although the Constitution did not exist"<sup>254</sup> and would be subject to resolution by state tribunals. With the provision in section 34 for the application of state rules of decision, Rawle

<sup>249</sup> W. RAWLE, *supra* note 186, at 261.

<sup>250</sup> *Id.*

<sup>251</sup> *Id.* at 261-62. Rawle, finding support in article III, thought that certain cases "may arise under the Constitution which do not arise under the laws." *See id.* at 254. Including criminal cases in this category, he wrote:

1. On the formation of society, prior to positive laws, certain rules of moral action necessarily arise, the foundation of which is the observance of justice among the members of the society.

2. On the formation of the Constitution of the United States, such rules arose without being expressed: the breach of them constitutes offences against the United States.

3. If no judiciary power had been introduced into the Constitution of the United States, the state courts could have punished those breaches.

4. The creation of such judiciary power was intended to confer jurisdiction over such and other offences, not to negative or destroy it.

*Id.* at 259.

<sup>252</sup> *Id.* at 261.

<sup>253</sup> *Id.* at 254.

<sup>254</sup> *Id.*

argued, Congress rightly had avoided "a strange anomaly" by "declar[ing] that whatever relief would be afforded by other judicial tribunals in similar cases, shall be afforded by the courts of the United States."<sup>255</sup>

Following Rawle's train of thought entails a painful mental process for us. When he states that cases involving "contracts to which the United States are parties" *arise under* the Constitution, it seems as though he is advocating the application to such cases of the sort of federal common law heralded in *Clearfield Trust Co. v. United States*.<sup>256</sup> On the contrary, Rawle thought the applicable law to be "the laws of the several states," despite recognizing "that every state in the Union has its peculiar system and rules of decision in cases for which no positive statutes are provided."<sup>257</sup> Rawle was apparently endorsing what Marshall wrote some years before: "That on adopting the existing constitution of the United States the common & statute law of each state remained as before & that the principles of the common law of the state would apply themselves to magistrates of the general as well as to magistrates of the particular government."<sup>258</sup>

Part of what is reported in the last few paragraphs flows from the philosophy that unwritten law is a body of principles to be discovered. Beyond this, Rawle was contending that "in all civil cases those rules of decision founded on reason and justice which form the basis of general law, are within the reach and compose parts of the power" of article III courts.<sup>259</sup> Still another theme, even more elusive to modern comprehension, is also present: in citing crimes and contracts with the United States as the only instances of jurisdiction "arising under the Constitution," Rawle was elaborating a doctrine of federal sovereignty. Those were the only instances in which new cases *arose* due to the adoption of the Constitution. These cases arose because the United States was a

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<sup>255</sup> *Id.* at 255.

<sup>256</sup> 318 U.S. 363 (1943). *Clearfield* held that "[t]he rights and duties of the United States on commercial paper which it issues are governed by federal rather than local law." *Id.* at 366. This law was to be derived from "the federal law merchant," which "stands as a convenient source of reference for fashioning federal rules applicable to these federal questions." *Id.* at 367.

<sup>257</sup> W. RAWLE, *supra* note 186, at 254.

<sup>258</sup> Letter from John Marshall to St. George Tucker, *reprinted* in Appendix A, *infra*. Rawle also quoted Marshall's remark that the British common law was the "substratum of the laws of every state," and endorsed another judge's conclusion that "every nation has its common law." W. RAWLE, *supra* note 186, at 267 n.\* (quoting 2 D. ROBERTSON, REPORTS OF THE TRIALS OF COLONEL AARON BURR 402 (Philadelphia 1808) (actual quote is "[British] laws form the substratum of our laws"); *Guardians of the Poor v. Greene*, 5 Binn. 554, 558 (Pa. 1813) (actual quote is "every country has its common law")).

<sup>259</sup> W. RAWLE, *supra* note 186, at 255.

new sovereign, and the authority to enter into contractual relations and to punish crimes sprang from the sovereign powers attached to its creation. These were new cases in that the government in question was a freshly created entity. The United States might enter into contracts as any private individual could, and they would be "obligatory on the party, though merely implied by reason of principles not found in the text of any statute, but originating in universal law."<sup>260</sup>

To some extent, Rawle's vision of federal jurisdiction was constrained by the shared assumption of the day that the national government had few lawmaking responsibilities. Nonetheless, this does not explain a curious thread running through almost all of the commentary of this time regarding jurisdiction. Both Rawle and Du Ponceau, for example, wrote to the effect that although federal courts "have not jurisdiction *from* the common law," they do have "jurisdiction *of* the common law."<sup>261</sup> Likewise, Marshall, in referring to *William's Case*,<sup>262</sup> noted that "the common law was not relied on as giving the court jurisdiction, but came in incidentally as part of the law of a case of which the court had complete & exclusive possession."<sup>263</sup> Marshall then added, "I do not understand you as questioning the propriety of thus applying the common law, not of England, but of our own country."<sup>264</sup>

Obviously "common law" was being employed by these writers in two different senses: first, as a system of established rules, including the accepted practices of reasoning used to enunciate and apply those rules; and second, as a means of defining the jurisdiction of courts. Du Ponceau noted that these two usages were often confused, but thought this not to be "astonishing":

In England, the jurisdiction of almost every tribunal is derived from the common law, that is to say from ancient usage. From the same source proceeds, at the same time, almost the whole of the English jurisprudence. Jurisdiction and law flow together in a mixed stream, which in that country there is little necessity to analyse in order to separate

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<sup>260</sup> *Id.*

<sup>261</sup> P. DU PONCEAU, *supra* note 6, at 20. Citing Du Ponceau's work with approval, Rawle wrote that common law could furnish a "rule or mean for [the] exercise" of a federal court's jurisdiction; it was not "a source of jurisdiction." W. RAWLE, *supra* note 186, at 267 & n.†.

<sup>262</sup> 29 F. Cas. 1330 (C.C.D. Conn. 1799) (No. 17,708).

<sup>263</sup> Letter from John Marshall to St. George Tucker, *reprinted in* Appendix A, *infra*; see also Addison, *supra* note 13, at 1083 (complaining that the Republicans had introduced "[c]onfusion . . . by an ambiguous application of the phrase common law, using it sometimes as a limit of jurisdiction, and sometimes as a rule of judgment").

<sup>264</sup> Letter from John Marshall to St. George Tucker, *reprinted in* Appendix A, *infra*.

its component parts; while in this country, a phenomenon has suddenly appeared, of a national judiciary in a manner assimilated to municipal tribunals by the various limitations of its powers, not as between the different Courts of which it might be composed, and with a view to settle their respective bounds of authority, but as between them and the tribunals of component parts of the nation, which, though dependent to a certain extent on the national government in all its branches, are still sovereign to all other purposes within their respective limits. The common law, therefore, is not the source to be recurred to to unravel the intricacies of this system.<sup>265</sup>

This is a hard passage to untangle, and Du Ponceau himself admitted that he had been struggling with the concepts involved. One message comes across with clarity: federal courts are unlike the common-law courts of England in a fundamental respect. The statement that common-law jurisdiction and the law of a case were merged "in a mixed stream" meant that a claim at law was associated with a particular form of action, which could be heard only in certain of the King's courts and according to designated rules of procedure. "The inquiry was not whether plaintiff should recover under the law of the land, but whether plaintiff had proved a case *in trespass*, or *in covenant*, or in whatever form of action he had brought. If not, plaintiff lost the case, whatever the merits of it were."<sup>266</sup> Accordingly, the jurisdiction of these courts was inseparable from the history of the substantive law with which they were associated. Defining these jurisdictions involved not only an ongoing contest among the permanent courts of the King, but also a competition between these national courts and those of local and specialized jurisdiction. Although the common-law courts gradually assumed control over most of the important judicial business of the kingdom, leaving the local courts as "petty courts, courts for the smaller affairs of the smaller folk,"<sup>267</sup> the local law itself was constantly impelled towards uniformity by the example of the common law.<sup>268</sup> For our purposes, the main point is that there was only one sovereign authority involved. Local law in the British setting bore no relation to state law in America, the latter being an attribute of the original sover-

<sup>265</sup> P. DU PONCEAU, *supra* note 6, at 6-7.

<sup>266</sup> F. JAMES & G. HAZARD, *CIVIL PROCEDURE* 10 (3d ed. 1985).

<sup>267</sup> 1 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 532 (1952).

<sup>268</sup> See 2 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 398-400 (4th ed. 1936).

eighty possessed by the states as a consequence of the Revolution.<sup>269</sup>

By the end of the eighteenth century, American courts accepted the doctrine of jurisdiction associated with the Dutch jurist, Ulrich Huber.<sup>270</sup> In Huber's view, the reach of all laws was defined territorially: "The laws of each state have force within the limits of that government and bind all subject to it, but not beyond."<sup>271</sup> Marshall restated this principle in an 1812 decision:

The jurisdiction of courts is a branch of that which is possessed by the nation as an independent sovereign power. The jurisdiction of the nation, within its own territory, is necessarily exclusive and absolute; it is susceptible of no limitation, not imposed by itself. . . . All exceptions, therefore, to the full and complete power of a nation, within its own territories, must be traced up to the consent of the nation itself.<sup>272</sup>

As an example of nations consenting to a derogation of their territorial sovereignty, Marshall cited the exemption of sovereigns and their ministers from arrest or detention in a foreign territory.<sup>273</sup> Huber's illustrations involved what are now termed "conflict of laws" principles.<sup>274</sup>

Territoriality was not the only aspect of sovereignty accepted at this time. Another was recognized by Blackstone: "[T]here is and must be in all [civil societies] a supreme, irresistible, absolute uncontrolled authority, in which the *jura summi imperii*, or the rights of sovereignty, reside."<sup>275</sup> Quite apart from Blackstone's prestige,<sup>276</sup> knowl-

<sup>269</sup> That the states' sovereignty was a product of their historical separation in the colonial period and the various jealousies appearing during the Confederation does not alter this conclusion. The issue is how sovereignty was perceived, and by 1787 "[s]tate boundaries were important factors in separating the people of the United States." W. CARPENTER, *supra* note 21, at 101.

<sup>270</sup> See Nadelmann, *Joseph Story's Contribution to American Conflicts Law: A Comment*, 5 AM. J. LEGAL HIST. 230, 230-31 (1961).

<sup>271</sup> U. HUBER, *De Conflictu Legum Diversarum in Diversis Imperiis*, in PRAELECTIONUM JURIS CIVILIS TOMI TRES (2d ed. Leipzig 1707), reprinted and translated in Lorenzen, *Huber's De Conflictu Legum*, 13 ILL. L. REV. 375, 403 (1919). On Huber's theories, see Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 258-60; Yntema, *The Historic Bases of Private International Law*, 2 AM. J. COMP. L. 297, 305-08 (1953).

<sup>272</sup> *The Schooner Exchange v. McFadden*, 11 U.S. (7 Cranch) 116, 136 (1812); *accord* *United States v. Bevens*, 16 U.S. (3 Wheat.) 336, 386-87 (1818) (Marshall wrote that "the jurisdiction of a state is co-extensive with its territory; co-extensive with legislative power.").

<sup>273</sup> See *The Schooner Exchange v. McFadden*, 11 U.S. (7 Cranch) 116, 137 (1812).

<sup>274</sup> See Lorenzen, *supra* note 271, at 401-04; Nadelmann, *supra* note 270, at 230-31; Yntema, *supra* note 271, at 305-07.

<sup>275</sup> Tucker, *supra* note 43, at 49. In England, Blackstone wrote, sovereignty resided in the King, the House of Lords, and the House of Commons. See *id.* at 50-51.

<sup>276</sup> See E. BAUER, *COMMENTARIES ON THE CONSTITUTION, 1790-1860*, at 17-24

edgeable Americans were conversant with this concept as a consequence of the revolutionary experience. Prior to the commencement of actual hostilities, a principal American argument against British rule had centered on the notion of "divided sovereignty." While many were willing to concede that the English government had sole control over the external relations of the colonies, that is, foreign affairs and commerce, Americans insisted that colonial assemblies possessed the "'exclusive right of internal legislation,' including taxing."<sup>277</sup> The British rejoinder was as irrefutable as it was caustic. To accept the American view would violate the very basis of sovereignty, that for a given territory there could be only a single, indivisible, supreme power. Governor Thomas Hutchinson rebuked the Boston Town Meeting in 1773: "[N]o line . . . can be drawn between the supreme authority of Parliament and the total independence of the colonies: it is impossible there should be two independent legislatures in one and the same state . . . ."<sup>278</sup> By the time the final rupture occurred, Americans had resigned themselves to this logic, and saw themselves presented with a stark choice. It was one that Benjamin Franklin had appreciated in 1768: "that Parliament has a power to make *all laws* for us, or that it has a power to make *no laws* for us . . . ."<sup>279</sup>

Throughout the Revolutionary period, American statesmen experimented with various theories to avoid the dichotomy presented by the doctrine of indivisible sovereignty.<sup>280</sup> A typical position was that the colonists owed no allegiance to Parliament, but retained a tie only to the person of the King.<sup>281</sup> Some also claimed that the theory of unitary

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(1952); Pound, *The Development of American Law and Its Deviation from English Law*, 67 LAW Q. REV. 49, 51 (1951); Waterman, *Thomas Jefferson and Blackstone's Commentaries*, in *ESSAYS IN THE HISTORY OF EARLY AMERICAN LAW*, *supra* note 23, at 454-56.

<sup>277</sup> B. BAILYN, *supra* note 22, at 223 (quoting Dickinson, *An Essay on the Constitutional Power of Great Britain over the Colonies in America*, in 3 PENNSYLVANIA ARCHIVES 491, 515 (2d ser.) (J. Linn & W. Egle eds. 1896)); accord W. CARPENTER, *supra* note 21, at 30. This was the position taken by the first Continental Congress. See B. BAILYN, *supra* note 22, at 223.

<sup>278</sup> B. BAILYN, *supra* note 22, at 220 (quoting *SPEECHES OF THE GOVERNORS OF MASSACHUSETTS, FROM 1765 TO 1775* 340 (A. Bradford ed. 1818)).

<sup>279</sup> Letter from Benjamin Franklin to William Franklin (Mar. 13, 1768), reprinted in 5 THE WRITINGS OF BENJAMIN FRANKLIN 115 (A. Smyth ed. 1907).

<sup>280</sup> Sorting out the various theories on the subject of sovereignty would require an extended discussion, to which other writers have addressed themselves. See B. BAILYN, *supra* note 22, at 198-229; G. WOOD, *supra* note 21, at 344-54.

<sup>281</sup> See B. BAILYN, *supra* note 22, at 75 n.20; G. WOOD, *supra* note 21, at 352; McIlwain, *The Historical Background of Federal Government*, in *FEDERALISM AS A DEMOCRATIC PROCESS* 34-36 (1942); see also L. LABAREE, *ROYAL GOVERNMENT IN AMERICA* 3 (1930) ("Throughout the seventeenth century and the first six decades of

sovereignty applied only to a nation, not to an empire.<sup>282</sup> James Iredell wrote in 1774 that the theory was inapplicable "to the case of several *distinct and independent legislatures*, each engaged within a *separate* scale, and employed about *different* objects."<sup>283</sup>

Although positions on sovereignty were often expressed with firm conviction, a major accomplishment of the Revolutionary dialogue was to expose the immense complexities of implementing a federal governmental structure. In the process, these exchanges set the outlines of future debate over the structure of the American national government, both during the Confederation period and thereafter. A distinction between external and internal affairs appealed to the colonists, however scornfully it was greeted on the other side of the ocean. For a variety of reasons, the colonists traditionally had enjoyed a large measure of de facto autonomy over their domestic affairs.<sup>284</sup> At the same time, it was difficult to deny a formal tie to Great Britain, particularly in regard to the empire's control over trade relations.<sup>285</sup> From this historical setting—of a remote government having a vaguely defined "external" relation to separate colonial governments—the long debate over the powers of a national American government began.

In the struggles of the years before the Civil War, a particular concept of the states—having become, in consequence of the Revolution, "sovereign, and independent, not only of Great Britain, but of all other

the eighteenth, the colonies were recognized as dependencies of the English crown and not of the English people nor even their representatives in parliament.").

<sup>282</sup> See B. BAILYN, *supra* note 22, at 216-17.

<sup>283</sup> Iredell, *To the Inhabitants of Great Britain*, reprinted in 1 LIFE AND CORRESPONDENCE OF JAMES IREDELL 219 (G. McRee ed. 1857).

<sup>284</sup> See B. BAILYN, *supra* note 22, at 202; J. SCHMIDHAUSER, *supra* note 58, at 4-5. Colonial policy was dominated by the Crown and its administrative officials, see L. LABAREE, *supra* note 281, at 4-5, and by the close of the seventeenth century royal control over colonial affairs was increasing, see R. MORRIS, *STUDIES IN THE HISTORY OF AMERICAN LAW* 62 (2d ed. 1958). Appeals could be taken from colonial courts to the Privy Council; this occurred in 795 cases between 1696 and 1783, resulting in 157 affirmances, 336 reversals, and 147 dismissals. See Goebel, *supra* note 177, at 462. "[T]he colonists did not regard the appeal as good for nothing," *id.*, but the Council "was never . . . an efficient overseer of the routine work of the courts." L. FRIEDMAN, *supra* note 29, at 43; accord Schlesinger, *Colonial Appeals to the Privy Council II*, 28 POL. SCI. Q. 433 (1913). See generally J. SMITH, *APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS* (1950). Colonial legislation was also subject to review by the Council, although "the practice of disallowance was not carried out with great vigor." R. MORRIS, *supra*, at 63. One investigator found a disapproval rate of only 5.5% (469 out of 8,563). See *id.* See generally E. RUSSELL, *THE REVIEW OF AMERICAN COLONIAL LEGISLATION BY THE KING IN COUNCIL* (1915). In addition, "the control over legislation was not popular in the colonies and various expedients were used to evade it, such as delay in transmitting laws, the temporary enactment, and the reenactment of disallowed legislation." J. GOEBEL, *CASES AND MATERIALS ON THE DEVELOPMENT OF LEGAL INSTITUTIONS* 763 (1937).

<sup>285</sup> See B. BAILYN, *supra* note 22, at 203.



powers, whatsoever,"<sup>286</sup>—was transfixing in its grasp on the imagination. Americans had long understood their social contract to be with a state, rather than the nation. James Wilson had said that "when a confederate republic is instituted, the communities of which it is composed surrender to it a part of their political independence, which they before enjoyed as states."<sup>287</sup> This statement applied to the new constitution, despite the fact that its ratification had been deliberately requested of the *people*, not the states.<sup>288</sup> Moreover, the federal government possessed powers that no single American state had ever enjoyed. Nevertheless, there was an irresolvable dilemma once the concept of pre-existing state sovereignty was acknowledged. The people voted in conventions, but by states, and they saw themselves giving up a few powers while leaving the bulk of state authority intact.

There was a competing view of the Union. Justice Paterson wrote in the late 1790's that the Articles of Confederation had been "a league entered into between the states, as such, and was purely federal; whereas the [Constitution] partakes of nationality, and is the work of the people as contradistinguished from states."<sup>289</sup> Such a Union was itself, in the terms of that era, a continuing social contract, which could not be breached merely because a state became dissatisfied and decided to retire to its own nationhood. No amount of verbal exchange could settle this core dispute of antebellum America, and in the end only force could produce a resolution.

Prior to the violence, the issue of sovereignty was debated in several contexts, all of which are familiar to students of American constitutional law. In *Martin v. Hunter's Lessee*,<sup>290</sup> Justice Story defended appellate jurisdiction over the decisions of state tribunals: "It is a mistake, that the constitution was not designed to operate upon states, in their corporate capacities. It is crowded with provisions which restrain or annul the sovereignty of the states, in some of the highest branches of their prerogatives."<sup>291</sup> Then, in *Cohens v.*

<sup>286</sup> Tucker, *supra* note 43, at 406-07.

<sup>287</sup> 1 THE WORKS OF JAMES WILSON 539 (J. Andrews ed. 1896), *quoted in* J. GOUGH, THE SOCIAL CONTRACT 234 (1957).

<sup>288</sup> See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 58, at 88 (George Mason) ("The Legislatures have no power to ratify it. They are the mere creatures of the State Constitutions, and cannot be greater than their creators.").

<sup>289</sup> W. Paterson, *supra* note 76, at 555.

<sup>290</sup> 14 U.S. (1 Wheat.) 304 (1816).

<sup>291</sup> *Id.* at 343. Story emphasized at the outset of his opinion that

[t]he constitution of the United States was ordained and established, not by the states in their sovereign capacities, but emphatically, as the preamble of the constitution declares, by 'the People of the United States.' . . . The Constitution was not, therefore, necessarily carved out of

*Virginia*,<sup>292</sup> the Court was faced with Virginia's argument that a state criminal conviction could not be reviewed by the Supreme Court:

The State judges are bound by oath to obey the constitutional acts of Congress; but they are not so bound to obey the decisions of the federal Courts: the constitution and laws of the United States are supreme; but the several branches of the government of the United States have no supremacy over the corresponding branches of the State governments.<sup>293</sup>

In response, Marshall recited the supremacy clause, to which he added, "This is the authoritative language of the American people; and, if gentlemen please, of the American States."<sup>294</sup> He then repeated Story's argument from *Martin* as to the various surrenders of state sovereignty in the Constitution. Supreme Court review in constitutional cases was essential, lest "the government and its laws" be "prostrate[d] . . . at the feet of every State in the Union."<sup>295</sup>

As constitutional law classes are often prodded to conclude, the claims about sovereignty in *Martin* and *Cohens* are not logically inevitable. To pursue this idea further would distract us from the subject,

existing state sovereignties, nor a surrender of powers already existing in state institutions . . . .

*Id.* at 324-25.

<sup>292</sup> 19 U.S. (6 Wheat.) 264 (1821).

<sup>293</sup> *Id.* at 325-26. The basis of Virginia's argument was that

[t]he States have parted with exterior sovereignty. As they cannot make treaties, perhaps they have not jurisdiction in the case of ministers sent to the federal government; as they cannot make war and peace, regulate commerce, define and punish piracies and offences on the high seas, and against the law of nations, or make rules concerning captures on the water, perhaps they have no admiralty jurisdiction.

*Id.* at 325.

<sup>294</sup> *Id.* at 381.

<sup>295</sup> *Id.* at 385. Marshall advanced his own theory of dual sovereignty:

That the United States form, for many, and for most important purposes, a single nation, has not yet been denied. In war, we are one people. In making peace, we are one people. In all commercial regulations, we are one and the same people. In many other respects, the American people are one; and the government which is alone capable of controlling and managing their interests in all these respects, is the government of the Union. . . . The people have declared, that in the exercise of all powers given for these objects, it is supreme. It can, then, in effecting these objects, legitimately control all individuals or governments within the American territory. The constitution and laws of a State, so far as they are repugnant to the constitution and laws of the United States, are absolutely void. These states are constituent parts of the United States. They are members of one great empire—for some purposes sovereign, for some purposes subordinate.

*Id.* at 413-14.

but it should be noted that there was a stronger argument for the supremacy of the Constitution, federal statutes, and treaties, than for the supremacy of a federal common law. For one thing, it was conceded that the Constitution was intended to produce a supreme law in these areas. That much granted, there was a fair amount of plausibility in concluding that Supreme Court review was necessary to create a consistently applied national law. Moreover, as Story pointed out in *Martin*, it was "an historical fact, that this exposition of the constitution, extending [federal] appellate power to state courts, was, previous to its adoption, uniformly and publicly avowed by its friends, and admitted by its enemies, as the basis of their respective reasonings, both in and out of the state conventions."<sup>296</sup>

No similar arguments were available to defend the supremacy of a federal common law. Quite the contrary, for a theory that pictured sovereignty as indivisibly tied to a particular territory pulled thinking in precisely the opposite direction. States emerged from the Revolution with the powers of sovereigns. Their courts continued, as we have seen, to operate within the bounds of their familiar common-law jurisdictions.<sup>297</sup> They might, for reasons previously explored, depart from much of common-law doctrine, but the general outline of their traditional systems remained intact, including the English practice of proceeding through the forms of action.<sup>298</sup> "Jurisdiction and law," to recall Du Ponceau's nice turn of phrase, "flow[ed] together in a mixed stream."<sup>299</sup> Claiming cognizance over a common-law issue could be perceived as asserting general jurisdiction over all cases related to the corresponding form of action. Portions of the law merchant, for instance, had been absorbed into the English common-law courts by expansion of the writ of *assumpsit*.<sup>300</sup> A federal court's insistence on jurisdiction based on the presence of a mercantile issue might have been taken in more than a few quarters as a pretext for expanding judicial authority generally over commercial cases involving individuals wholly within the territory of a state. Being familiar with the manner in which certain British courts had increased their jurisdiction through similar "fictions," which often had resulted in the displacement of power from courts accustomed to its exercise, an identical conspiracy would have

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<sup>296</sup> 14 U.S. (1 Wheat.) at 351.

<sup>297</sup> See *supra* text accompanying notes 25-29.

<sup>298</sup> Mary K. Tachau's examination of the federal district court in Kentucky found that only a few of the available English forms of action were actually permitted; these, however, were vigorously applied. See M. TACHAU, *supra* note 25, at 83.

<sup>299</sup> P. DU PONCEAU, *supra* note 6, at 6.

<sup>300</sup> See F. KEMPIN, *supra* note 239, at 95.

been perceived.<sup>301</sup>

The debate over federal common law had to take place within the constraints of this understanding of jurisdiction and sovereignty. And the battle raged amidst the ongoing dispute over national powers and in the center of a partisan crossfire. The proposition that sedition was a form of conduct within the power of the federal government to prohibit naturally aroused the wrath of those concerned with the preservation of state prerogatives. We need not revisit the remainder of the debate to see what went wrong with the Federalist defense. Republicans pushed them into a selection of two alternatives: either the jurisdiction of federal courts over nonstatutory crimes was based on the British common law, or this jurisdiction was conferred by the Constitution. The former no Federalist ever directly advanced. But to suspicious Republicans, certain loose remarks by Federalists could have been plausibly interpreted to mean that federal jurisdiction was being equated with that of the English common-law courts. Against the latter alternative, which Federalists did defend, their opponents were able to argue convincingly that a move was afoot toward consolidation. For the Constitution was supreme, the common law a complete system—and so on.

#### 4. Congressional Authorization of Common-Law Jurisdiction

It is tempting to think that Federalists missed an easy escape from this doctrinal trap. Why did they not argue that *Congress* could bestow on federal courts jurisdiction over common-law offenses or over any common-law matter that Congress itself might legislate under its delegated powers? We now know, after *Textile Workers Union v. Lincoln*

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<sup>301</sup> On earlier Antifederalist warnings that the federal judiciary would expand through similar fictions, see *supra* note 138 and accompanying text. The writer Brutus gave an example:

The court of king's bench, in England, extended [its] jurisdiction [through legal fictions]. Originally, this court held pleas, in civil cases, only of trespasses and other injuries alledged [sic] to be committed *vi et armis*. . . . In process of time, by a fiction, this court began to hold pleas of any personal action whatsoever; it being surmised, that the defendant has been arrested for a supposed trespass that "he has never committed, and being thus in the custody of the marshall of the court, the plaintiff is at liberty to proceed against him, for any other personal injury: which surmise of being in the marshall's custody, the defendant is not at liberty to dispute." By a much less fiction, may the pleas of the courts of the United States extend to cases between citizens of the same state. . . . [T]his power will diminish and destroy both the legislative and judicial authority of the states.

*Essays of Brutus (XII)* (Feb. 14, 1788) (quoting with minor changes 3 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 42-43 (1st Am. ed. Philadelphia 1772), reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 126, at 427.

*Mills*,<sup>302</sup> that the Supreme Court eventually found such common-law jurisdiction for civil cases unobjectionable.<sup>303</sup> Certainly *Lincoln Mills* is in line with the Du Ponceau-Marshall approach, as it authorizes the making of common law while continuing to prohibit jurisdiction based on the common law. But *Hudson*, we shall see, denied even this possibility. Moreover, the opinion did not address section 11 of the 1789 Judiciary Act, which gave circuit courts jurisdiction "of all crimes and offences cognizable under the authority of the United States,"<sup>304</sup> as a possible source of jurisdiction over common-law crimes.<sup>305</sup>

Justice Johnson's opinion in *Hudson* does show an awareness of the reasoning urged by James Sullivan and William Rawle: "The only ground on which it has ever been contended that this jurisdiction could be maintained is, that, upon the formation of any political body, an implied power to preserve its own existence and promote the end and object of its creation, necessarily results to it."<sup>306</sup> After acknowledging this argument, Johnson promptly rejected it:

But, without examining how far this consideration is applicable to the peculiar character of our constitution, it may be remarked, that it is a principle by no means peculiar to the common law. It is coeval, probably, with the first formation of a limited government; belongs to a system of universal law, and may as well support the assumption of many other powers as those more peculiarly acknowledged by the com-

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<sup>302</sup> 353 U.S. 448 (1957) (federal court's authority to interpret and enforce collective bargaining agreements based on jurisdictional provisions of the Labor Management Relations Act of 1947).

<sup>303</sup> The Supreme Court has cited *Lincoln Mills* as an example of "[f]ederal common law . . . com[ing] into play when Congress has vested jurisdiction in the federal courts and empowered them to create governing rules of law." *Texas Indus. v. Radcliff Materials, Inc.*, 451 U.S. 630, 642 (1981). Commentators have been less certain that Congress intended this result. See, e.g., Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1 (1957).

<sup>304</sup> Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 79.

<sup>305</sup> Apparently, Justice Johnson did take up the issue of statutory jurisdiction under section 11 in *Trial of William Butler for Piracy*, *supra* note 219. For a discussion of Johnson's probable authorship of this publication, see Jay, *Part One*, at 1016 n.49. The opinion states that advocates of this interpretation of section 11 "are obliged to construe [the section] as meaning the same with 'all crimes and offences committed against the United States,' or rather 'to every individual Act which if committed in Great Britain would by the Common Law be deemed an offence against the Crown.'" *Trial of William Butler for Piracy*, *supra* note 219, at 29 (quoting Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78). Further, the decision maintains that "under authority of the United States" means "authority to make laws, and those laws may give authority to punish crimes . . . to wit, 'Crimes and offences against the United States made punishable by laws passed in conformity to the powers delegated to that body by the Constitution.'" *Id.* at 29-30.

<sup>306</sup> 11 U.S. (7 Cranch) at 33.

mon law of England.

But if admitted as applicable to the state of things in this country, the consequence would not result from it, which is here contended for. If it may communicate certain implied powers to the general government, it would not follow, that the courts of that government are vested with jurisdiction over any particular act done by an individual, in supposed violation of the peace and dignity of the sovereign power. The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offence.

Certain implied powers must necessarily result to our courts of justice, from the nature of their institution. But jurisdiction of crimes against the state is not among those powers. To fine for contempt, imprison for contumacy, enforce the observance of order, &c., are powers which cannot be dispensed with in a court, because they are necessary to the exercise of all others: and so far our courts, no doubt, possess powers not immediately derived from statute; but all exercise of criminal jurisdiction in common-law cases, we are of opinion, is not within their implied powers.<sup>307</sup>

This passage evidences more than a desire to limit the *scope* of national legislative powers; it addresses the *form* in which those powers may be exercised. Even presuming the national government possesses "the implied power to preserve its own existence," Congress may not confer on the courts a *general* jurisdiction over common-law crimes, but must specifically define the criminal acts and their punishments.<sup>308</sup> Congress, in short, was denied the power to grant a federal court the kind of common-law criminal jurisdiction that a court in England or one of the states would have.

How could *Hudson* have come to this conclusion when it was well understood that judicial power encompassed the authority to operate

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<sup>307</sup> *Id.* at 33-34.

<sup>308</sup> *Id.* at 33. Johnson undoubtedly did not mean that Congress would have to specify every element of an offense, as in modern criminal codes. Existing federal criminal statutes typically specified an offense only by its name and punishment. *See, e.g.,* An Act for the Punishment of certain Crimes against the United States, ch. 9, § 3, 1 Stat. 112, 113 (1790) ("That if any person or persons shall, within any fort, arsenal, dock-yard, magazine, or in any other place or district of country, under the sole and exclusive jurisdiction of the United States, commit the crime of willful murder, such person or persons on being thereof convicted shall suffer death."). As Justice Story noted, federal courts were thus required to utilize common-law principles to supply the definition of the crime. *See United States v. Coolidge*, 25 F. Cas. 619, 620 (C.C.D. Mass. 1813) (No. 14,857), *rev'd*, 14 U.S. (1 Wheat.) 415 (1816).

under unwritten law? Justice Johnson explained that the powers of the federal government were composed of concessions from the states. Other than the Supreme Court's jurisdiction, "derived immediately from the constitution," "[a]ll other courts created by the general government possess no jurisdiction but what is given them by the power that creates them, and can be vested with none but what the power ceded to the general government will authorize them to confer."<sup>309</sup> For this reason, Johnson found it unnecessary

to inquire, whether the general government, in any and what extent, possesses the power of conferring on its courts a jurisdiction in cases similar to the present; it is enough, that such jurisdiction has not been conferred by any legislative act, if it does not result to those courts as a consequence of their creation.<sup>310</sup>

Not only had Congress not authorized the hearing of "cases similar to the present," but it could not: "[W]ith what propriety can [a federal court] assume to itself a jurisdiction, much more extended, in its nature very indefinite, applicable to a great variety of subjects, varying in every state in the Union . . .?"<sup>311</sup>

While this last question was a rebuke of the circuit court's assumption of jurisdiction in the instant case, it made a much broader point. Johnson was aiming at common-law jurisdiction itself—by nature "indefinite, applicable to a great variety of subjects," and tied to a particular sovereign's territory ("varying in every state in the Union"). To allow federal courts to proceed in a common-law prosecution, even with Congress's sanction, would in his mind necessarily mean that their jurisdiction was of the "nature" of a common-law court in England. Notice how this fits with his rebuttal of the contention that every government inherently possesses the ability to ensure its own existence. Conceding as much, Johnson emphasized that this principle could not logically be limited to implying a common-law jurisdiction over crimes but "may . . . support the assumption of many other powers *as those more peculiarly acknowledged by the common law of England.*"<sup>312</sup>

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<sup>309</sup> 11 U.S. (7 Cranch) at 33.

<sup>310</sup> *Id.*

<sup>311</sup> *Id.*

<sup>312</sup> *Id.* at 34 (emphasis added). On circuit the year following *Hudson*, Justice Johnson apparently wrote the opinion in *Trial of William Butler for Piracy*, *supra* note 219. The report of the case contains similar evidence of Johnson's assumption that the assertion of federal common-law jurisdiction inevitably implied the adoption of the totality of British common law by the national government. Morton Horwitz has construed the same text to mean something different: that federal courts could act under a common-law jurisdiction if it were granted to them by Congress. See M. HORWITZ,

Justice Story was convinced that *Hudson* represented a devastating blow to law enforcement and accordingly commenced a campaign condemning the decision. Indicative of Story's activities is a May 1813 correspondence to Nathaniel Williams, lamenting that, due to the "grossly and barbarously defective" criminal code of the United States, "[t]he Courts are crippled; offenders, conspirators, and traitors are enabled to carry on their purposes almost without check."<sup>313</sup> The previous October, he had urged Williams, "Pray induce Congress to give the Judicial Courts of the United States power to punish all crimes and offences against the Government, as at common law."<sup>314</sup>

Story's desire for Congress to affirm a federal criminal jurisdiction "as at common law" was founded on his belief that the alternative, "passing laws in detail respecting every crime in every possible shape," was "utterly impracticable."<sup>315</sup> Story set forth his plan for expanding

*supra* note 23, at 10. He quotes the following passage:

We do not deny, nor do we suppose it was ever denied—that, if [this doctrine of implication could be maintained, and] Congress had by Law vested in this Court jurisdiction over all cases to which the punishing power of the United States might [under that implication] be extended, it would then rest with this Court to decide (wild and devious as the track assigned them would be) to what cases that jurisdiction extended.

*Id.* at 271 n.39 (quoting Trial of William Butler for Piracy, *supra* note 219, at 34-35) (The material in brackets appears in the original but is omitted by ellipses in Horwitz's recitation.).

Viewing the last sentence as it was originally written is important: far from being supererogatory, the "doctrine of implication" is the focus of the opinion. "Implication" and "implied powers" appear prominently in the opinion as contradistinctions to "express" powers enjoyed by the national government. See Trial of William Butler for Piracy, *supra* note 219, at 26-32. Indeed, the parallel use of "implied powers" in *Hudson* and *Butler*, see *supra* text accompanying note 307, supports the assumption that Johnson also wrote the latter. Jurisdiction by "implication" for common-law crimes is constitutionally impossible, except in narrow circumstances. Other than treason, which *Butler* said was defined by the Constitution itself, see Trial of William Butler for Piracy, *supra* note 219, at 28-29, the only specific crimes mentioned in the Constitution are "offences on the High Seas and against the Law of Nations," and the definition of these "is expressly given as a *Legislative power*." *Id.* at 31.

This reference to legislation might suggest, as Horwitz has contended, that Johnson was primarily worried about judges making law. But *Butler* indicates that it would be sufficient for Congress to have "distinguished [the crime] by an epithet which leaves no doubt of its identity." *Id.* at 34. This might be done by using "language peculiar to the Common Law," after which the courts would use that law "to regulate us in the exercise of the jurisdiction thus conferred." *Id.* at 35. Obviously this "legislation by designation" left a wide range for what we would now call judicial legislation, and apparently Justice Johnson in *Butler* was unperturbed by that kind of judicial activism.

<sup>313</sup> Letter from Joseph Story to Nathaniel Williams (May 27, 1813), reprinted in 1 LIFE AND LETTERS OF JOSEPH STORY, *supra* note 18, at 244.

<sup>314</sup> Letter from Joseph Story to Nathaniel Williams (Oct. 8, 1812), reprinted in 1 LIFE AND LETTERS OF JOSEPH STORY, *supra* note 18, at 243.

<sup>315</sup> Untitled Manuscript of Joseph Story (1816), reprinted in 1 LIFE AND LET-



federal jurisdiction in an 1816 legislative proposal, which he submitted to Congress along with a manuscript explaining its provisions.<sup>316</sup> While admitting that the Justices disagreed as to "whether the Courts of the United States have from their very organization a general common law jurisdiction," he asserted that "none of us entertain any doubt as to the authority of Congress to invest us with this jurisdiction, so far as it applies to the sovereignty of the United States."<sup>317</sup>

In the context of a society well acquainted with common-law prosecutions, Story was not without reason in lamenting the restrictions on federal courts: "The smallest County Court or Court of *pie poudre* acts upon [the common law] and enforces it, even as to crimes . . . ."<sup>318</sup> Apart from the politically sensitive matter of sedition, there were ordinary crimes against the government (counterfeiting and bribery, for instance) that could have justified the exercise of federal common-law jurisdiction. Federal common-law authority could have been confined to those areas considered within federal competence generally, and further constrained by Congress's ability to control jurisdiction. No new *type* of judicial power would have been created—nothing departing from what state courts normally did. Story suggested a useful analogy:

We well know that all crimes which are punishable at common law in England, are not punishable here. But this is, in general, no result from positive acts of the Legislature; but

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TERS OF JOSEPH STORY, *supra* note 18, at 297-98.

<sup>316</sup> *Id.* at 293. Story described the reaction of the other Justices to this proposal as follows:

It received a revision from several of them, particularly Judges Marshall and Washington, and was wholly approved by them, and indeed, except as to a single section, by all the other Judges. Judge Johnson expressed some doubt as to the eleventh section [on criminal jurisdiction]; but, as I understood him, rather as to its expediency than the competency of Congress to enact it.

*Id.* at 300.

<sup>317</sup> *Id.* at 299. There is no corroboration of Story's assertion that the other Justices approved this plan; in view of *Hudson*, it seems dubious that a majority agreed. See *supra* text accompanying notes 307-08.

<sup>318</sup> *Id.* at 298. As if in direct response, the opinion in *Trial of William Butler for Piracy*, *supra* note 219, states:

Can any one doubt of the power of Congress . . . to pass laws, fully commensurate or even surpassing the Common Law provisions, for the punishment of offences against the sovereignty, rights, justice, peace, trade, or police of the United States? And why have they not done it in any particular case? Unquestionably, because they did not think it necessary.

*Id.* at 26-27. Further, it would be "officious, forward and intrusive" for a federal court to act where Congress had failed to legislate. *Id.* at 27. Only a few crimes were specified in the Constitution, and aside from treason they were to be put into operation by Congress. *Id.* at 14-16.

from an application of common law principles to the nature of our public institutions and constitutions of government. If, then, State Courts may apply the common law to State Constitutions, why may not United States Courts apply it to the Constitution of the United States?<sup>319</sup>

Story was not content with lobbying Congress over federal common-law jurisdiction. Only a few years later, a case arose in his circuit that allowed him to attempt to overrule or at least modify the *Hudson* doctrine. The case was *United States v. Coolidge*,<sup>320</sup> which involved a crime on the high seas, a subject indisputably within the article III grant of jurisdiction. Coolidge was tried for the alleged offense of forcibly rescuing a vessel after it had been lawfully seized by privateers while it had been sailing illegally under a British license.<sup>321</sup> Despite the recent decision in *Hudson*, Story, sitting as Circuit Justice, ruled that the defendants' acts were indictable at common law and within the jurisdiction of the circuit court by virtue of section 11 of the 1789 Act.<sup>322</sup> His *Coolidge* opinion was in large part a dissent from *Hudson*, which he noted had "been made without argument, and by a majority only of the court."<sup>323</sup> Story wrote that "it is not an improper course to bring the subject again in review for a more solemn decision, as it is not a question of mere ordinary import, but vitally affects the jurisdiction of the courts of the United States."<sup>324</sup>

At the outset, Story admitted "that the courts of the United States are courts of limited jurisdiction, and cannot exercise any authorities, which are not confided to them by the constitution and laws made in pursuance thereof."<sup>325</sup> His idea of limited jurisdiction differed sharply

<sup>319</sup> Untitled Manuscript of Joseph Story (1816), *reprinted in* 1 LIFE AND LETTERS OF JOSEPH STORY, *supra* note 18, at 299.

<sup>320</sup> 25 F. Cas. 619 (C.C.D. Mass. 1813) (No. 14,857), *rev'd*, 14 U.S. (1 Wheat.) 415 (1816).

<sup>321</sup> The setting was the British naval blockade during the War of 1812. The British counsel in Boston had been issuing licenses to American ships that enabled them to pass through the Royal Navy's lines. Although Congress had not yet declared it illegal to possess a British license, a Story opinion prior to *Coolidge* made a vessel that possessed the license liable to capture as a prize by privateers. *See The Julia*, 14 F. Cas. 27, 32 (C.C.D. Mass. 1813) (No. 7575) ("existence and employment of such license affords a strong presumption of concealed enemy interests"), *aff'd*, 12 U.S. (8 Cranch) 180 (1814). *The Julia* was an unpopular decision in New England because it allowed American cruisers to prey upon vessels attempting to maintain their accustomed shipping activities. *See* G. DUNNE, JUSTICE JOSEPH STORY AND THE RISE OF THE SUPREME COURT 107-08 (1970).

<sup>322</sup> *Coolidge*, 25 F. Cas. at 619-21.

<sup>323</sup> *Id.* at 621.

<sup>324</sup> *Id.*

<sup>325</sup> *Id.* at 619.

from that expressed in *Hudson*: "[W]hen once an authority is lawfully given, the nature and extent of that authority, and the mode, in which it shall be exercised, must be regulated by the rules of the common law."<sup>326</sup> Inasmuch as section 11 expressly gave circuit courts jurisdiction "of all crimes and offences, to which by the constitution of the United States, the judicial power extends,"<sup>327</sup> it remained only to specify what those crimes were. To answer this, "recourse must be had to the principles of the common law."<sup>328</sup> Story thought there was nothing improper about this analysis. "Innumerable instances" in the Constitution could be adduced to show an intent to explicate terms by their common-law meanings.<sup>329</sup> Likewise, Congress "provided for the punishment of murder, manslaughter and perjury, . . . but it has nowhere defined these crimes. Yet no doubt is ever entertained on trials, that the explanation of them must be sought and exclusively governed by the common law . . . ."<sup>330</sup>

With this foundation laid, Story proceeded to list the classes of cases that might constitute common-law crimes against the United States: "I will venture to assert generally, that all offences against the sovereignty, the public rights, the public justice, the public peace, the public trade and the public police of the United States, are crimes and offences against the United States."<sup>331</sup> Reliance on state law was inadequate assurance, "for these [laws] are not always applicable, as suits may be brought in the United States courts, which are not cognizable by state courts; as for instance, equity and admiralty causes."<sup>332</sup>

Story's reference to the problem created by exclusive federal jurisdiction over admiralty and maritime cases was not merely a reflection of his exasperation that the "disgraceful" conduct of Americans trading under British licenses was likely to go unpunished.<sup>333</sup> More critically, he used the fact that Coolidge's alleged offense was within the express

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<sup>326</sup> *Id.*

<sup>327</sup> *Id.* at 619-20.

<sup>328</sup> *Id.* at 620. Story added, "When I speak here of the common law, I use the word in its largest sense, as including the whole system of English jurisprudence." *Id.*

<sup>329</sup> *Id.* at 619.

<sup>330</sup> *Id.* at 620.

<sup>331</sup> *Id.* These crimes included "treason, embezzlement of the public records, bribery and resistance of the judicial process, riots and misdemeanors on the high seas, frauds and obstructions of the public laws of trade, and robbery and embezzlement of the mail of the United States." *Id.*

<sup>332</sup> *Id.*

<sup>333</sup> Letter from Joseph Story to Nathaniel Williams (Aug. 3, 1813), reprinted in 1 *LIFE AND LETTERS OF JOSEPH STORY*, *supra* note 18, at 247. Story accurately predicted the eventual outcome of *Coolidge*: "I should not be at all surprised that the actors should escape without animadversion, owing to the defects in our criminal laws." *Id.*

article III grant of admiralty jurisdiction to distinguish *Hudson*. "The admiralty is a court of extensive criminal, as well as civil jurisdiction, and has immemorially exercised both. . . . We have adopted the law of the admiralty in all civil causes cognizable by the admiralty: must it not also be adopted in offences cognizable by the admiralty?"<sup>334</sup>

Despite the cogency of Story's argument, *Coolidge* was reversed by the Supreme Court.<sup>335</sup> Justice Johnson issued the following brief opinion for the Court:

Upon the question now before the court, a difference of opinion has existed, and still exists, among the members of the court. We should, therefore, have been willing to have heard the question discussed, upon solemn argument. But the attorney-general has declined to argue the cause; and no counsel appears for the defendant. Under these circumstances, the court would not choose to review their former decision in the case of the *United States v. Hudson and Goodwin*, or draw it into doubt.<sup>336</sup>

While the Court's reluctance to decide an important question without argument by the parties is surely understandable, this was an odd way to end the long dispute over common-law crimes. A number of commentators writing within a few years of *Coolidge* indicated that they considered the question of common-law crimes raised in *Coolidge* and in *Hudson* to be unresolved. William Rawle, Peter Du Ponceau, and Thomas Sergeant all thought that the absence of argument in both

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<sup>334</sup> *Coolidge*, 25 F. Cas. at 621. This last point was difficult to dispute, at least so far as civil admiralty and maritime law were involved, since the use there of decision-making by unwritten law could hardly be gainsaid. Story's opinion in *The Julia*, 14 F. Cas. 27 (C.C.D. Mass. 1813) (No. 7575), *aff'd*, 12 U.S. (8 Cranch) 180 (1814), for instance, which was adopted by the Supreme Court on appeal, *see* 12 U.S. (8 Cranch) at 190, relied on treatises and decisions, ancient and modern, from various international sources—including British cases. Eventually the American courts produced a distinctive American law of admiralty, yet "English precedents had a pervasive influence upon the deliberations of the Court," if for no other reason than the frequent lack of other authority. 2 G. HASKINS *supra* note 36, at 452; *accord* 2 A. CHROUST, *supra* note 28, at 84 n.289; D. Sharpe, *The Origins of American Admiralty and Maritime Law 275-76* (1969) (unpublished S.J.D. thesis, Harvard Law School).

<sup>335</sup> *United States v. Coolidge*, 14 U.S. (1 Wheat.) 415 (1816).

<sup>336</sup> *Id.* President Madison's Attorney General, Richard Rush, confessed error on the ground that *Hudson* controlled the case. *Id.* at 415-16. Several of the Justices were, if not in agreement with Story, at least willing to hear the arguments. Justice Washington indicated that he was prepared to hear the matter "[w]hensoever counsel can be found ready to argue it," and would "divest [him]self of all prejudice arising from [*Hudson*]." *Id.* Similarly, Justice Livingston, who almost surely was in the *Hudson* majority, allowed that he was "disposed to hear argument . . . but until the question is re-argued [*Hudson*] must be taken as law." *Id.* Justice Johnson, however, "consider[ed] it to be settled, by the authority of [*Hudson*]." *Id.*

cases precluded a definitive resolution, and each constructed theories to support the exercise of common-law jurisdiction by federal courts when so authorized by Congress.<sup>337</sup> A writer in the *North American Review* of 1825 summarized the state of legal opinion on the subject of common-law powers for federal courts: "[W]e believe there are some of the fairest, and most intelligent minds in the country, that have not been quite able to come to a satisfactory conclusion."<sup>338</sup>

Justice Story did not let the matter rest. His extrajudicial efforts on behalf of a common-law jurisdiction for federal courts were not limited to the area of crimes. As part of a general program to "extend the national authority over the whole extent of power given by the Constitution," Story urged that "[the] Judicial Courts [should] embrace the whole constitutional powers."<sup>339</sup> Regarding the need for jurisdiction over "arising under" cases, Story contended: "[I]n thousands of instances arising under the laws of the United States, the parties are utterly without remedy, or with a very inadequate remedy."<sup>340</sup> He adduced a number of examples, including situations in which officers of the government withheld a right, such as land patents or customs clearances, or where the United States was incapable of protecting an interest created by national law, such as patent rights.<sup>341</sup>

Despite Story's efforts, nothing like his proposal came into existence until the Judiciary Act of 1875.<sup>342</sup> Although commentators might have perceived infirmities in *Hudson* and *Coolidge*, these decisions were never directly repudiated. In 1834, the Court decided a case of the sort addressed by Story in his lobbying activities. *Wheaton v. Peters*<sup>343</sup> was a diversity case involving an asserted copyright on reports of Supreme Court decisions. In response to Henry Wheaton's claim of a common-law copyright, Justice McLean wrote for the majority:

But, if the common law right of authors were shown to exist in England, does the same right exist, and to the same extent, in this country[?]

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<sup>337</sup> See W. RAWLE, *supra* note 186, at 258 n.\*, 259-73; P. DU PONCEAU, *supra* note 6, at 17-18; T. SERGEANT, *supra* note 187, at 274; see also H. WHEATON, *SOME ACCOUNT OF THE LIFE, WRITINGS, AND SPEECHES OF WILLIAM PICKNEY* 114-16 (New York 1826) (endorsing the approach taken by Du Ponceau).

<sup>338</sup> *Common Law Jurisdiction*, 21 N. AM. REV. 104, 106 (1825).

<sup>339</sup> Letter from Joseph Story to Nathaniel Williams (Feb. 22, 1815), *reprinted in* 1 LIFE AND LETTERS OF JOSEPH STORY, *supra* note 18, at 254.

<sup>340</sup> Untitled Manuscript of Joseph Story (1816), *reprinted in* 1 LIFE AND LETTERS OF JOSEPH STORY, *supra* note 18, at 294.

<sup>341</sup> See *id.* at 294-95.

<sup>342</sup> Judiciary Act of 1875, ch. 137, 18 Stat. 470 (codified as amended in scattered sections of 28 U.S.C.).

<sup>343</sup> 33 U.S. (8 Pet.) 591 (1834).

It is clear, there can be no common law of the United States. The federal government is composed of twenty-four sovereign and independent states; each of which may have its local usages, customs and common law. There is no principle which pervades the union and has the authority of law, that is not embodied in the constitution or laws of the union. The common law could be made a part of our federal system, only by legislative adoption.

When, therefore, a common law right is asserted, we must look to the state in which the controversy originated.<sup>344</sup>

*Wheaton* shows that *Hudson's* restrictive view of the extent of federal common-law powers was transferred very early to the civil arena. It may be that Justice Johnson and others on the *Hudson* Court were mindful of the relationship between the two: if Congress could declare a federal common-law jurisdiction for crimes, the same might be done for civil cases. Story's suggestion—to employ the language “arising under the laws of the United States”—could have served the purpose. As long as the potential for expansion of jurisdiction remained, the nightmare of a vast expansion of the federal establishment could be brought back to mind.

In any event, we do know that a considerable amount of redirection would be needed before the modern common law associated with the post—*Erie Railroad v. Tompkins*<sup>345</sup> era could be produced. Our inheritance from *Hudson* remains, and has left us with a federal common law that is more a maze of contradictions than anything else.

## II. THE RELEVANCE OF THE *Hudson* ERA TO MODERN FEDERAL COMMON LAW

### A. *Remarks on the Use of History by Courts*

No historical account is ever complete, and this essay is hardly an exception. We have examined only a sampling of opinion from a fairly distant era on the relation between the common law and the federal judiciary. Possibly that which is offered as an explanation for a phenomenon is itself an event that has its own story. Histories of the sort attempted here also tend to be elitist, concentrating on leading actors who had access to positions of power or at least channels of written communication. In view of the inherent difficulties that arise when one society attempts to understand another, these doubts could be multi-

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<sup>344</sup> *Id.* at 658.

<sup>345</sup> 304 U.S. 64 (1938).

plied endlessly. All the more is this so when the two societies are separated by enormous gulfs in cultural perspective and considerable differences in time.

Having highlighted these reservations, we can ignore them in some respects and profit from them in others. For those of us who enjoy history, however amateurish or casual our understanding, the enterprise will be interesting regardless of its incompleteness. Each generation of historians produces fresh data about a period, new ways of rearranging old information, and insights into interrelationships not previously recognized. In other words, there is plenty to occupy our imaginations without worrying excessively over the inevitable shortcomings of human knowledge.

Nevertheless, the past has a tendency to exert unusual control over the present, as our law continuously demonstrates. Precedent tends to be self-justifying. The remarks of our famous predecessors may be taken out of context and invoked in judicial opinions as a kind of inviolable text. Using history in this way avoids analysis of the continued viability of a principle or practice. In a given case, this might be an appropriate way of proceeding: it is sometimes better to stay with the tried and true than to venture into the unknown. Any established practice worth repudiating will have some adherents, and modifying it will inevitably defeat some expectations. More importantly, there can be unrecognized benefits to maintaining a practice. To explore these before making new decisions is difficult or impossible, and hence replacement expense is not easy to ascertain. Further, there are periods when we should wait for a calmer hour to do our rethinking.

These reservations about altering principles obviously can be pushed only so far, for otherwise nothing would ever change. The point here is not to add to the literature on why courts put so much store in established practices. If we assume that there is a value in being guided by the past, the question becomes how courts should discover and use legal history.

Legal history is, or should be, a form of political history. Without attempting a precise definition, the point of such a study is to explain "the shaping, distribution, and exercise of power"<sup>346</sup> in a given time period. Past judicial decisions provide a basis for inquiry into all three of these aspects of power relations in society.

An inquiry into judicial history is incomplete without reference to the political events surrounding the juridical action. For example, an

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<sup>346</sup> H. LASSWELL & A. KAPLAN, *POWER AND SOCIETY* 75 (1950).

account of *Marbury v. Madison*<sup>347</sup> might simply recite that the Supreme Court declared its authority to hold an act of Congress unconstitutional. A somewhat more thorough investigation would go on to discuss the reasons advanced by the Court for its conclusion. In such an account, the fact that the opinion was released in the highly charged political atmosphere of the early nineteenth century makes little difference. But to understand *why* the decision turned out the way it did one must be aware of the heated partisan struggles of the 1790's, which in turn requires a knowledge of events occurring in England and other parts of Europe. And that is only the opening foray. Political history deals with the development of ideologies, and a thorough analysis would include examining the evolution of the concept of judicial review, which hardly appeared suddenly from the murky air of 1803. That in turn demands an understanding of events and theories prevalent before and at the time of the Revolution.

For the most part, courts do not engage in the type of historiography needed to trace the idea of judicial review to the politics of the centuries preceding *Marbury*. A court will usually limit itself to consulting the holdings of prior cases, as typified by the present invocation of *Hudson*. Courts are more or less adept at the latter exercise. When a court embarks upon an ambitious historical investigation, the results are frequently disappointing from the standpoint of professional historians. It is not simply a question of the limitations of time and resources, although these play a major role.

Every judicial opinion is itself a political act, an exercise of power. A process of justification is involved, and the use of the past is always directed toward the resolution of a current controversy. No historiographical work is free from the values of its writer, but such studies by judges are especially likely to entail the interpretation of prior events in the light most favorable to present purposes. This appears inevitable, and not particularly undesirable, so long as there is an awareness that a political act is taking place.

Courts should engage in surveys of the history behind an issue, if for no other reason than to be aware of the process by which judicial power is developed and wielded.<sup>348</sup> As political actors who possess

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<sup>347</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>348</sup> It is significant, for instance, that the institution of judicial review had its origins in the same era in which the common-law jurisdiction of federal courts was first being debated. In developing a theory about the judiciary's place in a democratic society, the acceptance of judicial review needs to be juxtaposed against the sharp limitations placed on federal common law. Without engaging in a detailed comparison of the two, it is enough to note that courts, and observers of courts, must always be aware of the various faces of judicial activity.



power in the community through public office, judges are conscious of the authority that they hold. Of course, the degree of their cognizance varies according to the individual, the setting, and the epoch. Yet judicial opinions throughout American history frequently show a sensitivity to the issue of legitimacy. Doctrinal developments in any number of areas appear to have been influenced heavily by the courts' need to justify their competence to order the human affairs involved. Naturally we can never be sure what motivates a particular judicial act, and it would be foolish to propose any unified theory to explain generally what causes judges to decide the way they do. Even if we personalize the inquiry to the particular judge deciding a case, we usually are left largely in the dark, and this is all the more true when the subject lived long ago.

Consider the figure of Justice Johnson. In the years before *Hudson* he struck at least some as "bold, independent, eccentric, and sometimes harsh."<sup>349</sup> Johnson was likely smarting from the public rebuke that he received at the hands of his party in response to an 1808 decision in which he criticized Jefferson for acting illegally during the embargo of that year. Sitting on circuit in Charleston, Johnson had issued a writ of mandamus against the Collector of the Port, who had received a directive from the President ordering him not to allow ships carrying certain commodities to sail.<sup>350</sup> For his opinion that the executive had exceeded his statutory authority, Johnson was denounced by the Republican press for impeding the President's policy. Worse, he was accused in a published commentary by Attorney General Caesar A. Rodney of having acted without jurisdiction.<sup>351</sup> In a remarkable public defense, Johnson acknowledged that there was a serious question whether the court had possessed jurisdiction, but he lamely explained that the government had not raised the issue, and this "would, at least, excuse the act of the court."<sup>352</sup>

Assuming that Johnson learned a lesson from the experience, does this account for his opinions in a subsequent series of cases, including *Hudson* and *Coolidge*, in which he insisted on a limited reading of

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<sup>349</sup> 1 C. INGERSOLL, *HISTORY OF THE SECOND WAR BETWEEN THE UNITED STATES OF AMERICA AND GREAT BRITAIN* 74 (Philadelphia 1852), quoted in D. MORGAN, *JUSTICE WILLIAM JOHNSON* 75 (1954).

<sup>350</sup> See *Gilchrist v. Collector*, 10 F. Cas. 355 (C.C.D.S.C. 1808) (No. 5420); see also 1 C. WARREN, *supra* note 114, at 324-38 (1922).

<sup>351</sup> See D. MORGAN, *supra* note 349, at 61. The Attorney General's opinion, in the form of a letter to Jefferson, was published in newspapers at the time and appears in the report of the case. See 10 F. Cas. at 357-59.

<sup>352</sup> 10 F. Cas. at 366. Johnson's reply was printed in several newspapers. See 1 C. WARREN, *supra* note 114, at 334 & nn.1-2.

federal jurisdiction?<sup>353</sup> How does one factor in Johnson's ownership of plantations and slaves and his outspoken defense of that peculiar institution?<sup>354</sup> Did Johnson anticipate that Story, who he thought was attempting to expand admiralty jurisdiction beyond constitutional bounds in *De Lovio v. Boit*,<sup>355</sup> would within a few years declare slavery a violation of the law of nations—and slave ships condemnable by federal admiralty courts?<sup>356</sup> If these facts suggest a Justice blindly committed to states' rights, we must remember the occasions when Johnson went along with expansive readings of national powers.<sup>357</sup>

<sup>353</sup> See, e.g., *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 20 (1831) (concurring opinion); *Weston v. City Council*, 27 U.S. (2 Pet.) 449, 470 (1829) (dissenting opinion); *Ramsay v. Alleghre*, 25 U.S. (12 Wheat.) 611, 614 (1827) (concurring opinion); *Bank of the United States v. Planters' Bank*, 22 U.S. (9 Wheat.) 904, 910 (1824) (dissenting opinion); *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 871 (1824) (dissenting opinion); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 362 (1816) (concurring opinion).

<sup>354</sup> See D. MORGAN, *supra* note 349, at 99-103. Johnson proclaimed that "the Christian, who considers all conditions with a view to a state of probation, will often see more to be envied in the life of the slave than in that of the master." Address to the Literary and Philosophical Society of Charleston, South Carolina (Oct. 14, 1815), *quoted in id.* at 102.

<sup>355</sup> 7 F. Cas. 418 (C.C.D. Mass. 1815) (No. 3776). *De Lovio* held that the article III admiralty grant extends to all cases "originally and inherently" within the jurisdiction of British admiralty courts, *id.* at 443, and thus encompasses "all maritime contracts, torts, and injuries," *id.* at 444. On Johnson's reaction to *De Lovio*, see D. MORGAN, *supra* note 349, at 81. Johnson directed a vociferous attack on the Court's expansion of admiralty jurisdiction in *Ramsay v. Alleghre*, 25 U.S. (12 Wheat.) 611, 614 (1827) (concurring opinion). There he argued that the Framers intended to set the jurisdiction of federal courts in admiralty along the lines that state courts exercised from the time of the Revolution. *Id.* at 638. He denied that British admiralty jurisdiction was intended as a standard of reference, and maintained that in any event "the jurisdiction anciently claimed by [the English Court of Admiralty] was founded in usurpation." *Id.*

<sup>356</sup> See *United States v. The La Jeune Eugenie*, 26 F. Cas. 832 (C.C.D. Mass. 1822) (No. 15,551). In grand jury charges in 1819, Story made comments that appear to address directly Johnson's views on the relationship between Christianity and slavery:

We believe in the Christian religion. It commands us to have good will to all men; to love our neighbors as ourselves, and to do unto all men as we would they should do unto us. It declares our accountability to the Supreme God for all our actions. . . . To me it appears perfectly clear, that the slave trade is equally repugnant to the dictates of reason and religion, and is an offence equally against the laws of God and man.

Charges to the Grand Juries for the Districts of Massachusetts and Rhode Island (1819), *quoted in* 1 LIFE AND LETTERS OF JOSEPH STORY, *supra* note 18, at 341. Concluding, he declared, "[I]f we tolerate this traffic, our charity is but a name, and our religion little more than a faint and delusive shadow." *Id.* at 347.

<sup>357</sup> For example, Johnson joined in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821), *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819), and *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). Johnson gave a broad reading to the commerce clause in his concurring opinion in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 222 (1824). Earlier, he had held on circuit that South Carolina's Negro

Turning over a few stones such as these does not suffice to reveal the complex personality of an important political figure. Merely to embark on the task should be enough to sober anyone who thinks that a reconstruction of the events and personalities of an era could ever approach completeness. Moreover, "completeness" is itself an illusive concept: how much we need to know about a figure from the past, and the affairs of the day, depends on our purposes. We will never know them as we do our contemporaries, or perhaps more importantly, as their contemporaries knew them.

It is possible to carry this skepticism too far, and the reader might wonder about a writer who concludes a work about history by seemingly doubting the worth of the entire effort. Putting aside the obvious answer, that the task is its own reward, there is a response more specific to the topic at hand. Political histories are in part intellectual histories. We have observed, though our view is obscured, the development of a related set of ideas over the course of a highly unusual generation. From what is known about the history of Western culture prior to the American Revolution, we can easily see that the question of common law (in all the senses of that term) as it related to the federal judiciary would have to be addressed. And so it was, although at times the attitudes of those involved must be inferred from their lack of attention to what seems to us a significant problem. All of those in public life were developing their various ideologies, and doing so in a context that had only the remotest of resemblance to our own. While it is difficult for us to imagine the common law provoking passionate oratory, the fact that it did should serve as a warning that what was said in that era cannot be applied bag and baggage to our own quite different time without introducing serious distortions.

#### B. *Applying the History of the Hudson Era to Modern Federal Common Law*

This is not to deny that there is a parallel between the issues surrounding *Hudson* and *Coolidge*, and modern cases treating federal common law. Reviewing some of the current judicial statements on the scope of federal common law, we see that the focus continues to be on the appropriateness of the exercise of a form of judicial power. There are concerns now as then for states' rights and the necessity for decisionmaking by regularly elected representatives. Equally evident is that these expressions are tied to the ideological orientations of the Supreme

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Seamen Act, which banned free blacks from entering the state, violated the commerce clause. See *Elkison v. Delieesseline*, 8 F. Cas. 493 (C.C.D.S.C. 1823) (No. 4366).

Court Justices. Granting that there are similar basic issues at stake, at least when the labels are cast in sufficiently broad terms, does not mean that the two eras saw matters in anything resembling the same light.

To illustrate these differences, consider Justice Powell's dissent in *Cannon v. University of Chicago*,<sup>358</sup> in which the Court implied a private right of action under Title IX of the Education Amendments of 1972<sup>359</sup> in favor of a rejected female applicant to a medical school. By inferring a federal cause of action from the antidiscrimination principle of Title IX,<sup>360</sup> the Court implicitly resolved the issue of federal subject matter jurisdiction.<sup>361</sup>

Justice Powell had two sets of objections to the decision. One falls under the rubric of "judicial process": whether it is advisable, in a democratic society, for a court to imply a private action from a statute that contains no such express authorization.<sup>362</sup> While Justice Powell raised some hard issues, most of them are applicable to state as well as federal courts. In the other group of concerns, however, Powell singled out federal courts, denying that they have the same power to create rights of action that state courts have.

With this second level of objections, Powell aligned himself with the stance that a majority of the Court had recently associated with *Hudson*. Although he did not cite *Hudson*, Powell used the same approach that the Court would follow in *Milwaukee v. Illinois*.<sup>363</sup> Like the *Milwaukee* Court, Powell cited *Erie Railroad v. Tompkins*,<sup>364</sup> and went so far as to call the *Cannon* majority's implication of a cause of action an unconstitutional course of decisionmaking:<sup>365</sup> "By creating a private action, a court of limited jurisdiction necessarily extends its authority to embrace a dispute Congress has not assigned it to resolve."<sup>366</sup>

Powell had particularly strong words for *Cort v. Ash*,<sup>367</sup> in which the Court set forth guidelines as to when a private cause of action might be implied from a federal statute that does not explicitly provide for one.<sup>368</sup> *Cort*, Powell noted, relied on decisions such as *Texas &*

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<sup>358</sup> 441 U.S. 677, 730 (1979) (Powell, J., dissenting).

<sup>359</sup> 20 U.S.C. § 1681 (1976).

<sup>360</sup> See *Cannon*, 441 U.S. at 688-717.

<sup>361</sup> For purposes of 28 U.S.C. § 1331 (1982), the claim must "arise" under federal law. See *Cannon*, 441 U.S. at 746 n.17 (Powell, J., dissenting).

<sup>362</sup> See *Cannon*, 441 U.S. at 743-49 (Powell, J., dissenting).

<sup>363</sup> 451 U.S. 304 (1980); see also *Parratt v. Taylor*, 451 U.S. 527 (1981); *United States v. Standard Oil*, 332 U.S. 301 (1947).

<sup>364</sup> 304 U.S. 64 (1938).

<sup>365</sup> See *Cannon*, 441 U.S. at 742 (Powell, J., dissenting).

<sup>366</sup> *Id.* at 746.

<sup>367</sup> 422 U.S. 66 (1975).

<sup>368</sup> *Cort* found four factors to be relevant in determining whether to imply a private cause of action:

First, is the plaintiff "one of the class for whose *especial* benefit the statute

*Pacific Railway v. Rigsby*,<sup>369</sup> which the *Cannon* majority believed to represent "the Court's earliest 'inference of a private right of action.'"<sup>370</sup> Summarizing *Rigsby*, Powell recited that it involved

[t]he narrow question . . . whether the standards of care defined by the Federal Safety Appliance Act's penal provisions applied to a tort action brought against an interstate railroad by an employee not engaged in interstate commerce at the time of his injury. *The jurisdiction of the federal courts was not in dispute*, the action having been removed from state court on the ground that the defendant was a federal corporation.<sup>371</sup>

Powell emphasized that, when *Rigsby* was decided in 1916, "[u]nder the regime of *Swift v. Tyson*"<sup>372</sup>

the Court was free to create the substantive standards of liability applicable to a common-law negligence claim brought in federal court. The practice of judicial reference to legislatively determined standards of care was a common expedient to establish the existence of negligence. . . . *Rigsby* did nothing more than follow this practice, and cannot be taken as authority for the judicial creation of a cause of action not legislated by Congress.<sup>373</sup>

Federal cases implying private causes of action in fact appeared long before *Rigsby*.<sup>374</sup> For example, in 1847 the Court decided *Waring v. Clarke*,<sup>375</sup> best remembered for its holding that the admiralty grant of article III "was not intended to be limited or to be interpreted by

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was enacted," *Texas & Pacific R. Co. v. Rigsby*—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

*Id.* at 78 (citations omitted).

<sup>369</sup> 241 U.S. 33 (1916).

<sup>370</sup> *Cannon*, 441 U.S. at 689.

<sup>371</sup> *Id.* at 732 (emphasis added).

<sup>372</sup> *Id.* (citing *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842)).

<sup>373</sup> *Id.*

<sup>374</sup> See *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 375 & nn.53-54 (1982) ("[T]he *Rigsby* approach prevailed throughout most of our history . . .").

<sup>375</sup> 46 U.S. (5 How.) 441 (1847).

what were cases of admiralty jurisdiction in England when the constitution was adopted.<sup>376</sup> *Waring* involved a claim arising from a collision on the Mississippi River; the parties were all from Louisiana.<sup>377</sup> A majority concluded that the case was within the admiralty jurisdiction.<sup>378</sup> Proceeding to the issue of liability, the Court sustained a finding for the libelants on the ground that the defendants' vessel was steering in the wrong channel at the time of the accident.<sup>379</sup> While this was sufficient to justify recovery, the Court went on in dictum to address the libelants' contention that the defendants' ship was not running with signal lights as required by a federal navigation statute imposing a fine for violations. "We do not put our decision . . . upon this ground, but we do say, if a collision occurs between steamers at night, and one of them has not signal lights, she will be held responsible for all losses until it is proved that the collision was not the consequence of it."<sup>380</sup>

Justice Powell might employ the same approach to analyze *Waring* that he used to distinguish *Rigsby*. In *Waring*, subject matter jurisdiction was based on the case being in admiralty. Admiralty jurisdiction depended on the site of the accident (navigable waters) and the subject of the claim (a collision between ships).<sup>381</sup> Unless Powell were to dismiss the statutory implication as mere dictum, he would then have to confront the absence of an explicit creation of jurisdiction or authorization of a private right of action in the navigation statute. He could complete the argument, as he did in *Rigsby*, by placing *Waring* within *Swift's* "regime."

But Powell and the other members of the Court probably would not associate *Waring* with the *Swift* theory of common-law adjudication. *Waring* would instead be considered under a special category of federal common law, in recognition that "[a]dmiralty law is judge-made law to a great extent,"<sup>382</sup> and that "the Judiciary has traditionally taken the lead in formulating flexible and fair remedies in the law maritime."<sup>383</sup>

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<sup>376</sup> *Id.* at 459.

<sup>377</sup> *Id.* at 441-42.

<sup>378</sup> *Id.* at 454-59.

<sup>379</sup> *Id.* at 464-65.

<sup>380</sup> *Id.* at 465. Literally, the Court did not imply an action from the statute. Rather, the opinion reveals the common-law assumption that negligence is actionable, and that the statute provides a standard of care. The defendant might still prevail if, despite a violation of the act, it could be shown that the negligence was not causally related to the injury. *See id.*

<sup>381</sup> *See id.* at 464 ("The locality of jurisdiction, then, having been ascertained, it must comprehend cases of collision happening on it.").

<sup>382</sup> *Id.* at 464.

<sup>383</sup> *United States v. Reliable Transfer Co.*, 421 U.S. 397, 409 (1975).

Actually the Court might also offer the specific inclusion of admiralty in article III as a distinguishing characteristic. Borrowing from David Currie's analysis of the difference between admiralty and diversity jurisdiction, the Court might rationalize common-law powers for the former class of cases on the ground that "a uniform law was apparently one reason for the establishment of the admiralty jurisdiction in 1789," whereas "the diversity jurisdiction is generally regarded as intended only to insure unbiased protection against the provincialism of state courts in the administration of their own laws."<sup>384</sup> Finally, the Court could recall Chief Justice Marshall's opinion in *American Insurance Co. v. Canter*:<sup>385</sup>

The Constitution and laws of the United States, give jurisdiction to the District Courts over all cases in admiralty; but jurisdiction over the case, does not constitute the case itself.<sup>386</sup>

After emphasizing that the admiralty and "arising under" grants are conceptually distinct, Marshall concluded that

[a] case in admiralty does not, in fact, arise under the Constitution or laws of the United States. These cases are as old as navigation itself; and the law, admiralty and maritime, as it has existed for ages, is applied by our Courts to the cases as they arise.<sup>387</sup>

At first glance, Marshall's point seems a perfect crowning to the argument: the grant of admiralty jurisdiction must be distinguished from the body of law to be applied, just as a federal court in diversity looks to non-federal rules of decision. However, Marshall's separation of the body of admiralty law from a court's authority to adjudicate was not merely a clever solution to a jurisdictional dispute,<sup>388</sup> but also a

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<sup>384</sup> Currie, *Federalism and the Admiralty: "The Devil's Own Mess,"* 1960 SUP. CT. REV. 158, 163 (footnote omitted).

<sup>385</sup> 26 U.S. (1 Pet.) 511 (1828).

<sup>386</sup> *Id.* at 544.

<sup>387</sup> *Id.* at 545.

<sup>388</sup> In *Canter* the question presented was whether a territorial court, staffed by judges not holding life tenure, could exercise jurisdiction over an admiralty claim. The Florida Territory had two types of courts, superior and inferior, and one of the latter had entered an award in a salvage case. An attack was brought against the judgment on the ground that the inferior court had no admiralty powers; it was argued that only the superior court possessed that authority, by virtue of a grant of exclusive jurisdiction to it over cases arising under the laws and Constitution of the United States. Marshall's opinion held, in part, that admiralty cases did not "arise under" the constitution or laws of the United States, and hence the inferior court was not barred from exercising admiralty powers. See 26 U.S. (1 Pet.) at 546. The more famous aspect of the case is

reflection of a way of comprehending law. The law was something apart from the court's exercise of its jurisdiction, a corpus to be discovered and applied to the facts at hand. There was never any question raised in *Canter* or *Waring* as to a federal court's authority to exercise traditional common-law powers.

But times have changed, and from the positivist perspective associated with post-*Erie* thinking about federal judicial competence, it is nonsensical to separate the court in question from the law it is applying. An admiralty court does not find law; rather, it engages in the political act of adjudication over subjects properly within its sphere of responsibility. The same goes for a diversity court, which is precisely the reason why a federal court in such cases is required to act as if it were a state court under the same circumstances.

It is understandable that the modern Court has been unable to justify the making of common law by federal courts in admiralty cases with anything more than a nod to longstanding practice.<sup>389</sup> Even in the post-*Erie* era, federal admiralty courts *do* exercise the prerogative of courts of general jurisdiction to make common law, only constrained within a particular subject matter. The ability to operate in a common-law manner over admiralty cases was never seen to require any congressional mandate. Indeed, it was long understood that Congress obtained *its* legislative authority in admiralty from article III.<sup>390</sup> It is true that Congress may control jurisdiction in the sense that it might not empower federal courts to hear admiralty claims. Once Congress vested the jurisdiction, however, the historical assumption has been that the courts involved were to act as admiralty courts always had acted.<sup>391</sup> Part of that manner of acting has been to imitate the ancient tradition of English courts in expanding jurisdiction through ingenious fictions that barely disguised the political motivations involved. American admiralty in the nineteenth century followed this path, and at the time even surpassed the English Court of Admiralty in pretensions to jurisdic-

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Marshall's decision that Congress could vest admiralty powers in non—article III “legislative courts.” See *id.*

<sup>389</sup> See, e.g., *Texas Indus. v. Radcliff Materials, Inc.*, 451 U.S. 630, 642 (1981) (“[A]dmiralty jurisdiction [is] one of the areas long recognized as subject to federal common law.”).

<sup>390</sup> See G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* 47 (2d ed. 1975); Shulman, *The Demise of Swift v. Tyson*, 47 *YALE L.J.* 1336, 1338 (1938). Professor Hill argues that “the Court went so far as to base congressional competence on the implications of the jurisdictional grant itself, apparently to ensure that the range of the legislative power would be not a whit less than that of the judicial power.” Hill, *Law-making Power*, *supra* note 220, at 1071 (footnote omitted).

<sup>391</sup> See *Panama R.R. v. Johnson*, 264 U.S. 375, 385-86 (1924); R. BRIDWELL & R. WHITTEN, *supra* note 203, at 36; G. GILMORE & C. BLACK, *supra* note 390, at 45.



tion.<sup>392</sup> The principal difference was that in England the diminution of the jurisdiction of the Court of Admiralty was accomplished by a transfer of cases to other national courts, while in America the parallel would have been the assumption of jurisdiction by state courts.

The gap between Marshall's perception of the nature of admiralty law and our own is evident from the approach he took toward its source. Marshall denied that admiralty cases arose under the Constitution or laws of the United States. As a species of international law, admiralty law was distinct from any national law, and federal courts were empowered merely to find this law, which was "as old as navigation itself." This sounds strange to our modern ears, schooled on positivism. The idea of "the law" being an entity apart from the decisionmakers who have the power to impose it has been well interred. Unsurprisingly, cases maintain that if federal courts have the authority to act as common-law courts in admiralty cases, the jurisdictional grant over admiralty in article III must be the source.<sup>393</sup> From an early nineteenth century perspective, this assertion would seem strange. To hold that admiralty law was somehow authorized by the Constitution would have been to contend that it is *part* of the Constitution, and hence unalterable by Congress.<sup>394</sup> That, we may recall, was exactly the grievance that Republicans raised with respect to the Federalist claim that the common law was applicable to the government of the United States.

Notwithstanding this recognition of common-law admiralty powers as springing from article III, the Court's general understanding of federal common-law powers marches in a rather different direction. Central to the Court's overall philosophy of federal common-law jurisdiction is the proposition that the mere grant of jurisdiction to a federal court does not amount to an authorization to "formulate" common law. Remarkably, the Court refers to *Erie* to prove the point.

*Erie* may have initiated a transformation in the way federal courts envisioned their common-law reach, but nothing about the decision sustains the Court's current assumptions about federal common-law powers. Nowhere does Justice Brandeis' opinion intimate that a grant of jurisdiction is inadequate to authorize the making of federal common law. Common-law adjudication, the fashioning of unwritten principles, is part and parcel of the traditional exercise of jurisdiction and was not

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<sup>392</sup> This was the cause of Justice Johnson's bitter complaint about the Court's expansion of admiralty jurisdiction. See *supra* note 355 and accompanying text.

<sup>393</sup> See, e.g., *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 160 (1920) ("The Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law . . .").

<sup>394</sup> See 2 W. CROSSKEY, *supra* note 121, at 875.

in the least trenching upon by *Erie*. Notably, on the same day that *Erie* was announced the Court held in *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*<sup>395</sup> that "whether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive."<sup>396</sup> *Erie*'s condemnation of the "unconstitutionality of the course pursued" under what the Court labeled "the doctrine of *Swift v. Tyson*" was not a repudiation of federal common law adjudication per se, but only of federal *general* common law.<sup>397</sup> *Erie* quoted Justice Holmes's classic statement of the positivist perspective: "[L]aw in the sense in which courts speak of it today does not exist without some definite authority behind it."<sup>398</sup> A common-law rule, in other words, must be associated with the sovereign that has authority to promulgate it: either the state or the federal government. And that sovereign must have the final word on interpretation of the rule. The objection to the regime of federal general common law was that the federal courts were disregarding the state judiciaries, the authoritative voices for a large segment of law.

*Erie* announced a principle of federalism; it did not declare the necessity for a federal court to receive authorization from Congress before it could engage in the making of common law within an area of jurisdiction assigned to the federal judiciary by article III. Under *Swift*, the *Erie* Court explained, "federal courts assumed, in the broad field of 'general law,' the power to declare rules of decision which Congress was confessedly without power to enact as statutes."<sup>399</sup> Brandeis could not have been plainer—the flaw in the pre-*Erie* federal system was the interference by federal authorities in matters that the Constitution left to the states. "Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts."<sup>400</sup> The vice was not that federal courts were engaged in the making of common law, but rather that federal courts were exercising an authority that Congress had not the power to grant them.<sup>401</sup>

<sup>395</sup> 304 U.S. 92 (1938).

<sup>396</sup> *Id.* at 110.

<sup>397</sup> *Erie*, 304 U.S. at 77-79.

<sup>398</sup> *Id.* at 79 (quoting *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

<sup>399</sup> 304 U.S. at 72.

<sup>400</sup> *Id.* at 78.

<sup>401</sup> John Hart Ely has written that "[c]ongressional legislation based upon the commerce clause certainly could have covered the specific question at issue in *Erie* and probably even that involved in *Swift*." Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 703 n.62 (1974). Although Ely does not explain why this "certainly"

Hence, nothing about *Erie* has any connection to the issue of implied rights of action involved in *Rigsby* or *Cannon*, which dealt with situations concededly within federal jurisdiction. Nor does *Erie* provide any guidance to courts in determining whether a particular subject matter is under federal or state sovereignty. That *Erie* did not consider this issue is a consequence of the logic behind the question presented, rather than any failure by the Court to reach a critical element of the case. No one disputed that, in the absence of "general" law, the substantive law to be applied was that of either Pennsylvania or New York. Consequently, there was no need to discuss the possible application of federal common law. The finding that federal courts had been interfering with state sovereignty in the realm of general law gave no hint as to when federal common law would be appropriate in *other* cases. *Erie* never attempted a principled explanation of the outer limits of federal common-law authority, or of the relationship of those theoretical limits to the potential scope of congressional authority. Not a word in *Erie* spoke to the problems to come in cases such as *Clearfield Trust Co. v. United States*,<sup>402</sup> *Banco Nacional de Cuba v. Sabbatino*,<sup>403</sup> or even *Hinderlider*. In these cases, in which the creation of federal common law was authorized, there was little if any statutory basis to justify the practice.<sup>404</sup>

It is undeniable that the granting of jurisdiction to a court does not

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must be so, perhaps he was basing his assumption on the Court's approval of the Safety Appliance Acts in *Southern Ry. v. United States*, 222 U.S. 20 (1911), together with the expansion of the commerce clause promised by *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). A better approach would be to ask why *Erie* seemed studiously to avoid the issue of Congress's potential power under the commerce clause over the precise question presented by the case. It was one thing to allow Congress to dictate the requirements for equipment used by interstate railways, or even to set up a worker compensation program for the railway industry. See *Second Employers' Liability Cases*, 223 U.S. 1 (1912). Quite another level of intrusion into state realms of interest would be involved if Congress were given express authority to displace ordinary rules of tort law in a field long thought to be the province of private state law. Recall that *Erie* predated *United States v. Darby*, 312 U.S. 100 (1941), and *Wickard v. Filburn*, 317 U.S. 111 (1942); even *Jones & Laughlin* went to lengths to relate the "effects" of the company's asserted unfair labor practices on interstate commerce. Doubtless the *Erie* Court had no enthusiasm for entering into a hypothetical discussion of what Congress might do about tort liability for interstate railroads in nonemployee situations. Instead the Court merely invoked a kind of operative presumption, that Congress *itself* had "no power to declare substantive rules of common law applicable in a State," including "the law of torts." 304 U.S. at 78. *Erie* did not address the bounds of judicial power where Congress *did* have the potential to legislate about a given matter, and simply had not done so.

<sup>402</sup> 318 U.S. 363 (1943).

<sup>403</sup> 376 U.S. 398 (1964).

<sup>404</sup> See Hill, *Law-making Power*, *supra* note 220, at 1042 ("[F]ederal judicial competence in these cases derives from the Constitution itself.").

inevitably confer upon it the ability to create common-law rules. That, however, is merely a specific application of a broader proposition, that the conferral of jurisdiction does not dictate the judicial processes attached to its exercise, unless the granting organ qualifies the conferral of jurisdiction with specific limitations. Examples might be the withholding of equity powers from a court or the excision of classes of cases that are associated with equity. In the absence of explicit directions to the contrary, a court's mode of proceeding is defined by tradition, that is, the outcome of political clashes and accommodations that have stretched over the life of a culture. All courts, both state and federal, continuously define their powers by reference to the society around them, of which the other branches of government are a part. "[A]s is so often true in our federal system, allocations of jurisdiction have been carefully wrought to correspond to the realities of power and interest and national policy."<sup>405</sup>

Jurisdictional statutes inevitably are cast in terms of generalized references to subject matter, with few clues as to how a court is to operate when real cases come along. A better instance of this could not be found than section 1331, which since 1875 has given federal courts jurisdiction over cases "arising under the . . . laws . . . of the United States."<sup>406</sup> Although the legislative history of the 1875 Act is sparse, substantial evidence exists to indicate that its drafters intended to grant, in the words of the Senate sponsor, "precisely the power which the Constitution confers—nothing more, nothing less."<sup>407</sup> Certainly the use in the statute of the exact wording of article III supports this interpretation.<sup>408</sup> Nonetheless, from the very beginning the Court has construed

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<sup>405</sup> *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 374-75 (1959).

<sup>406</sup> Judiciary Act of 1875, ch. 137, § 1, 18 Stat. 470, 470 (current version at 28 U.S.C. § 1331 (1982)).

<sup>407</sup> 2 CONG. REC. 4987 (1874) (statement of Sen. Carpenter). The Supreme Court has "recently reaffirmed what has long been recognized—that 'Article III "arising under" jurisdiction is broader than federal question jurisdiction under § 1331.'" *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 103 S. Ct. 2841, 2846 n.8 (1983) (quoting *Verlinden B.V. v. Central Bank of Nigeria*, 103 S. Ct. 1962, 1972 (1983)). It reached this conclusion in spite of Senator Carpenter's expressed opinion that the 1789 Judiciary Act was unconstitutional because it "did not confer the whole power which the Constitution conferred." 2 CONG. REC. 4986 (1874). The 1875 Act drew very little contemporary comment, see Forrester, *The Nature of a "Federal Question"*, 16 TUL. L. REV. 362, 375 (1942), despite the enormous implications of Carpenter's view. One commentator did note that the law was passed "with indecent haste . . . before the justices of the supreme court knew anything about it." Editor's Note, 3 CENT. L.J. 312, 312 (1876).

<sup>408</sup> See Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 160 (1953).

section 1331 to confer less jurisdiction than authorized by article III.<sup>409</sup> Had the Court given the statute its widest possible reading, it would have made federal district courts "substantially courts of general jurisdiction, since large numbers of law suits could be said to depend potentially on relevant issues of federal law."<sup>410</sup> Rather than reach this politically untenable result, the Court has treated the "arising under" portion of the 1875 Act as a charge to develop a federal common law of judicial jurisdiction, going so far as to hold that federal common law itself is a "law" of the United States for purposes of the jurisdictional provision.<sup>411</sup> This is an entirely appropriate development, reflecting the process by which jurisdictional powers must inevitably be defined.

Nothing in this means that courts are somehow autonomous, self-defining institutions. Quite the contrary, their actions continuously provoke reactions from many segments of society, legislatures not the least among them. In terms of broadly restraining or shaping the operational characteristics of courts, it is hard to imagine how a statute or constitution could accomplish the task. Traditions, like morality, cannot be legislated.

Beyond this, the conferral of subject matter jurisdiction is unrelated to the issue of what law will be applied to a case. A court in one state may apply the law, common or statutory, of another state or of the federal government. A federal court operating under diversity jurisdiction usually will follow state law, but not necessarily: some issues may be federal in nature or may be governed by the law of a foreign country. When jurisdiction is based on the fact that the claim "arises under" federal law, the court may nevertheless feel obliged to resolve certain issues by reference to state or foreign law.

In a special way, choice of law is unrelated to the *form* of the

<sup>409</sup> See M. REDISH, *supra* note 166, at 64; Forrester, *supra* note 407, at 377.

<sup>410</sup> Cohen, *The Broken Compass: The Requirement That a Case Arise "Directly" Under Federal Law*, 115 U. PA. L. REV. 890, 891 (1967). In *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), the Court appeared to read article III in a way that left few limits on its scope. As Professor Redish explains, *Osborn* seems to have held that "in any case where a federal issue *could* be raised—apparently regardless of how clear the answer or how small the likelihood that it actually will be raised—Congress has the power under Article III to vest jurisdiction in the federal courts." M. REDISH, *supra* note 166, at 56; accord H. FINK & M. TUSHNET, *FEDERAL JURISDICTION: POLICY AND PRACTICE* 30-31 (1984). Recently the Court said that "*Osborn* . . . reflects a broad conception of 'arising under' jurisdiction, according to which Congress may confer on the federal courts jurisdiction over any case or controversy that might call for the application of federal law." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 492 (1983). The *Verlinden* Court left open the issue of article III jurisdiction where the presentation of a federal question was merely a "remote" or "speculative" possibility. See *id.* at 492-93.

<sup>411</sup> See *Illinois v. City of Milwaukee*, 406 U.S. 91, 100 (1972).

exercise of judicial powers. A federal diversity court continues to operate under common-law assumptions when it puts itself in the place of a state court, so that it retains the power to imply a right of action from a state statute, or to create a common-law action by analogy to other recognized claims. It may be aiming to duplicate the outcome at which a state court of the forum would arrive, but it must have the inherent capacity to perform the functions that allow for a successful imitation. When that same court turns its attention to an admiralty case, it is able to act in a common-law fashion not because the law is federal but because it is a court acting within the tradition of common-law adjudication. In denying that a federal court has authority to imply a private right of action from a federal statute, the Court conflates the issues of choice of law and judicial powers. Such a statute does produce questions of federal law, but not insofar as the plaintiff's claim is concerned. Inasmuch as section 1331 was, as the Court has declared, designed "for vindicating every right given by the Constitution, the laws, and treaties of the United States,"<sup>412</sup> the plaintiff is left with no federal rights. If a right exists for which a remedy can be fashioned, it must be of state or foreign law origin. At the same moment, the Court has made a determination regarding its common-law powers. Section 1331 was not meant, at least in the case where the Court is rejecting the implied right, as a congressional authorization to proceed in a common-law manner.

Once we understand that *Erie* does not support the current efforts to limit the making of common law by the federal judiciary, it becomes evident why *Hudson* is a necessary addition for a Court committed to that end. *Hudson* is taken to represent a model of the federal judiciary in which powers are constrained in a way that the powers of state courts are not. Further, *Hudson* is said to instruct that federal courts are of "limited" jurisdiction and must receive explicit authorization from Congress before they may exercise common-law powers. On this view, *Erie* is a complementary decision. When state law must be resorted to, a federal court does engage in the process of making common law, but only in furtherance of the goal of arriving at the same outcome that a court of that state would.

Let us imagine for a moment that this reconstruction of *Hudson's* meaning is precisely correct from a historical point of view and that the Court is faithfully operating under the constitutional design for the exercise of federal judicial power. If that is so, *Erie* itself was wrongly

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<sup>412</sup> Steffel v. Thompson, 415 U.S. 452, 464 (1974) (quoting F. FRANKFURTER & J. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 65 (1928)).

decided, since that case accomplished a wholesale revision of established doctrine.

The analysis in *Erie* had two aspects. The first was an interpretation of section 34 of the 1789 Judiciary Act.<sup>413</sup> Based on Charles Warren's study, the Court concluded

that the purpose of the section was merely to make certain that, in all matters except those in which some federal law is controlling, the federal courts exercising jurisdiction in diversity of citizenship cases would apply as their rules of decision the law of the State, unwritten as well as written.<sup>414</sup>

Failure to follow this dictate, the Court concluded, had led to the "mischievous results" of forum shopping and unequal administration of the laws.<sup>415</sup>

A second aspect of *Erie* was the constitutional dimension discussed above: federal courts have no authority to intrude upon areas of law-making, whether common or statutory, reserved to the states. "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State."<sup>416</sup>

Warren surely was right in concluding that section 34 had been intended to apply to both statutory and common law. No fancy textual analysis was needed to prove the point. Federal courts long before *Swift* honored established interpretations of local common law, just as they followed settled constructions of state statutes.<sup>417</sup> *Swift* did no more than recite the accepted understanding of this procedure, with which section 34 was thought to be consistent. There was no concept of a federal general common law at the time of *Swift*. Throughout the nineteenth century, matters that *Erie* would place under that heading were ordinarily referred to as *state* law.<sup>418</sup> *Swift* addressed the occasions on which this law related to "questions of a more general nature," including the construction of ordinary contracts and issues of general commercial law, as to which

the state tribunals are called upon to perform the like functions as ourselves, that is, to ascertain upon general reasoning and legal analogies, what is the true exposition of the

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<sup>413</sup> Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92 (current version at 28 U.S.C. § 1652 (1982)).

<sup>414</sup> 304 U.S. at 72-73 (citing Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1923)).

<sup>415</sup> 304 U.S. at 74-77.

<sup>416</sup> *Id.* at 78.

<sup>417</sup> See *supra* text accompanying notes 184-85.

<sup>418</sup> See *supra* text accompanying notes 180-85.

contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case.<sup>419</sup>

If the Court really wished to be faithful to the approach of its predecessors, *Erie* should cause some consternation. It might appear bizarre to us, but *Swift's* rendition of the law-finding function of a common-law court was not perceived then as a threat to state sovereignty.<sup>420</sup> Neither the dissent nor contemporary legal commentary raised any objection to this aspect of the case.<sup>421</sup> Justice McLean joined the opinion, even though he had written in *Wheaton v. Peters*<sup>422</sup> that there was no common law of the United States.<sup>423</sup> *Swift's* summary of the doctrine of general common law also comports well with the structure of article III. Why was the Supreme Court given the potential to review diversity cases (which would have included cases coming from state courts), if not to correct errors of law? Furthermore, when the Constitution was drafted, the common law was interpreted through the medium of British authorities. Differences may have existed among the various states as to the applicability and interpretation of the British common law, but it was a common reference point, and the mode of reasoning about that law was a part of our inheritance.

Federal courts were from the earliest of proceedings understood to have only a "limited jurisdiction." Then, as now, this expression was taken as a succinct description of the essential nature of federal courts. Part of this is the idea that Congress controls federal lower court jurisdiction. Neither in the nineteenth century nor at present, however, does this serve to differentiate between federal and state courts. The jurisdiction of both is subject to the ultimate control of a legislature, or to some other form of fairly direct popular revision. While the term "limited" connotes for us the *absence* of a general power to fashion common law, from the nineteenth-century standpoint this interpretation confuses the *scope* of subject matter jurisdiction with the *forms* of judicial activity that may be utilized in exercise of the judicial power. Thomas Sergeant gave a typical account of "limited" federal jurisdiction in his treatise on constitutional law:

A circuit court, though an *inferior* court in the language

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<sup>419</sup> 41 U.S. (16 Pet.) at 19.

<sup>420</sup> See T. FREYER, *supra* note 181, at 17-18.

<sup>421</sup> See R. NEWMYER, *supra* note 181, at 336. One commentator has argued that *Swift* was an "attempt to provide a legal framework in which judges could respond" to the movement associated with codification and anti-legalism. Note, *Swift v. Tyson Exhumed*, 79 YALE L.J. 284, 310 (1969).

<sup>422</sup> 33 U.S. (8 Pet.) 591 (1834).

<sup>423</sup> For Justice McLean's discussion of common law in *Wheaton*, see *supra* text accompanying notes 343-44.



of the constitution, is not so in the language of the common law; nor are its proceedings subject to those narrow rules, which the courts of Westminster applied to special courts, or inferior courts held by charter. It is a court of original and durable jurisdiction; analogous to the court of King's Bench in England, and entitled to as liberal intendments and presumptions in its favour as any Supreme Court. Still, however, it is a court of *limited* jurisdiction, and has cognisance not of cases generally, but only of a few specially circumstanced, amounting to a small proportion of the cases which an unlimited jurisdiction would embrace . . . .<sup>424</sup>

Federal courts are still "limited" in the way that Sergeant used the word. Hotly disputed in the years before he wrote were the zones of federal competence, and from the Republican view of national powers, it might be deduced that there was no national common law. Since then, federal authority has expanded vastly beyond the point that any Jeffersonian would have considered within the original constitutional understanding. In the sense that we presume judges will make rules at times when the legislature has not acted, common-law adjudication forms a backdrop to both state and federal legislation. If we choose to restrict greatly what federal courts may do in the absence of legislation, this is not a consequence of some historical agreement that these courts were to be so "limited." In those days, the entire federal establishment was repeatedly labeled a "limited" one.

There is another curious aspect of *Erie*. Immediately after declaring that the *Swift* doctrine must be abandoned for constitutional reasons, Brandeis wrote that a federal court is required to apply state law except as to "matters governed by the Federal Constitution or by Acts of Congress."<sup>425</sup> This would have sounded very odd from the perspective of a century before. Admiralty law, or any of the multitudinous branches of the law of nations, would not have been thought of as "governed" or in any way adopted by the Constitution. Federal courts were given authority to decide cases according to the principles of this law, yet the Constitution did not "govern" these areas. Federalists, we may recall, at times made such comments about common-law crimes against the United States, and the reaction was vehement. One of the main aims of *Hudson* was to dispel whatever lingering doubts there were as to whether the Constitution had received any form of the British com-

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<sup>424</sup> T. SERGEANT, *supra* note 187, at 104 (footnotes omitted).

<sup>425</sup> *Erie*, 304 U.S. at 78.

mon law.

Federal courts, as we have seen, retained far-reaching common-law powers after *Hudson*. If the Court wishes to renounce *Swift*'s version of general common law, it should be with a frank recognition that this amounts to a repudiation of the original understanding of federal judicial powers, and of common-law interpretation itself.

Presented with this dilemma, commentators these days have tended to veer in two different directions. One camp examines the various areas of federal common law now recognized and traces their origins to particular concerns of the framing generation. Admiralty and the law of nations are usually offered as fields of law that the Framers thought implicated vital national interests. Consequently, they should be taken as "merely illustrative of the classes of common law committed to federal jurisdiction and, pro tanto, subject to creation by the federal judiciary."<sup>426</sup> The argument requires allusion to "an organic theory of the Constitution—one that views it as a living document which must grow to meet current needs."<sup>427</sup> It concludes that "[t]here may be other areas of law that today affect important national interests and that should be similarly incorporated into Article III."<sup>428</sup>

There is admittedly some force to this contention. On the other hand, an equally logical argument, starting from the same premises, can lead in exactly the opposite direction. Martin Redish, for example, grants the historical reasons for placing admiralty within article III: "Maritime commerce with foreign nations at the time was conducted primarily, if not exclusively, on the high seas."<sup>429</sup> It might be added that the only important interstate or international commerce in the late eighteenth century was by sea. Why not, on an "organic theory," extend federal power to fashion common law to all important areas of national commerce? While conceding that "the conduct of multistate commercial enterprises may give rise to different legal consequences in different states," Redish suggests that this is "[o]ne of the prices paid for a federal system."<sup>430</sup> If the interest in uniformity "is not considered a sufficiently strong basis for the creation of federal common law to govern transactions or occurrences on land," then "[i]t is unclear why this lack of predictability is so significant in the case of maritime commerce that, solely in that area, it justifies the creation of federal com-

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<sup>426</sup> Note, *Federal Common Law and Article III: A Jurisdictional Approach* to Eric, 74 YALE L.J. 325, 337 (1964).

<sup>427</sup> *Id.*

<sup>428</sup> *Id.*

<sup>429</sup> M. REDISH, *supra* note 166, at 98.

<sup>430</sup> *Id.* at 100.

mon law."<sup>431</sup>

Both of these positions are logically supportable. The categories of cases in which current doctrine allows federal common-law adjudication are nothing more than that—various categories. And the categories themselves are not principled distinctions. To some extent they are united by vague references to national interests. *Clearfield*, for instance, ventures that, in matters dealing with the commercial transactions of the United States, "[t]he application of state law, even without the conflict of laws rules of the forum, would subject the rights and duties of the United States to exceptional uncertainty."<sup>432</sup> But the same could be said about other large-scale interstate commercial activities,<sup>433</sup> and the need for predictable rules could be invoked equally to extend the scope of federal common law to those activities.<sup>434</sup> Turning the argument around, we could as well conclude that the United States ought to be treated like any other substantial business unit, and should have to endure the vicissitudes of state law, at least to the extent that there is no discrimination against the federal government. For well over a century the federal government was expected to conform to state law in its contractual dealings.<sup>435</sup> That was the understanding in the pre-*Erie* days, when the federal courts could take an independent view of common-law commercial doctrines.

A wealth of evidence is available to demonstrate an original understanding that certain recognized bodies of law should be developed uniformly, and that interference by the states would have negative ramifications at home and abroad. But historically these areas were not "federalized" in the way implicated by the current invocation of federal common law. Uniformity was instead to be achieved by providing access to federal courts, sometimes exclusive of state courts. The only areas in which anything resembling modern federal common law was to be applied were admiralty law and the law of nations. Both of these possessed an element of transnationality that made untenable any charge of interference with the territorial sovereignty rights of a state. More basically, federal competence in these areas was part of the origi-

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<sup>431</sup> *Id.*

<sup>432</sup> *Clearfield*, 318 U.S. at 367.

<sup>433</sup> See Gorrell & Weed, *Erie Railroad: Ten Years After*, 9 OHIO ST. L.J. 276, 296 n.86 (1948); Mishkin, *supra* note 166, at 830.

<sup>434</sup> See R. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 179 (1985).

<sup>435</sup> See *Mason v. United States*, 260 U.S. 545 (1923); H. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 770-71 (2d ed. 1973); Comment, *Rules of Decision in Nondiversity Suits*, 69 YALE L.J. 1428, 1439, 1442 & n.110 (1960); cf. Note, *Bills and Notes—Federal Question—Substantive Law*, 18 TUL. L. REV. 152, 155 (1943).

nal constitutional bargain. An oddity of the early thinking in this country about the common law is that admiralty and the law of nations were considered to be neither state law nor laws of the United States. The best answer we get is something along the lines of Marshall's formulation in *Canter*, that the admiralty law "has existed for ages [and] is applied by our Courts to the cases as they arise."<sup>436</sup>

Though *Swift* acknowledged that federal courts might take an independent view of general common-law doctrines, no one at the time would have dared to place the label "federal" on the resulting work.<sup>437</sup> Here again the early formulations were at times unclear. A significant branch of general law was related to the commercial field, which drew upon the law merchant—a kind of international law in the same way that admiralty was transnational. Still, commercial law was not considered a "law of the United States," and *Swift* did not so hold. Rather, Story's opinion doubted that section 34 included state decisions on matters of general law, since this would have violated the "ordinary use of language," by which "it will hardly be contended that the decisions of Courts constitute laws. They are, at most, only evidence of what the laws are, and are not of themselves laws."<sup>438</sup> Story and his colleagues never had to confront the issue whether "the general commercial law" was state or federal.<sup>439</sup> Notwithstanding this, a state could undoubtedly legislate as to subjects within the confines of "general law," something that could not be said of the federal government. From a modern point of view, the concession that a state has legislative jurisdiction means to us that the corresponding decisional law is "state." That is a fine example of one era transposing a phrase from the ordinary language of another to its own usage without pausing to recognize that such a transfer cannot occur without distorting what the original speakers meant.

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<sup>436</sup> *Canter*, 26 U.S. (1 Pet.) at 546.

<sup>437</sup> Later commentators were split as to whether federal courts acting in areas of general common law were indeed creating "federal" law. Compare Von Moschizsker, *supra* note 220, at 367-71 with 2 W. WILLOUGHBY, *THE CONSTITUTIONAL LAW OF THE UNITED STATES* 1038-39 (1910) and Bowman, *The Unconstitutionality of the Rule of Swift v. Tyson*, 18 B.U.L. REV. 659, 663, 675 (1938).

<sup>438</sup> 41 U.S. (16 Pet.) at 18.

<sup>439</sup> Except for questions relating to the Supreme Court's appellate jurisdiction, when it was at times necessary to determine if a federal question was involved, the pre-*Erie* practice did not require a clear demarcation between what we now call "federal common law" and state common law. See Reifenberg, *Common Law—Federal*, 30 OR. L. REV. 164, 166 (1951). Judge Wyzanski has noted that in the pre-*Erie* practice of trademark law "it was not customary or necessary to distinguish nicely as to what rule of law was applicable." *National Fruit Prod. Co. v. Dwinell-Wright Co.*, 47 F. Supp. 499, 501 (D. Mass. 1942). It has been contended that the *Swift* era "retarded the development" of federal common law. Friendly, *supra* note 122, at 407.

## CONCLUSION

The most we can conclude from a survey of jurisdictional theory from the *Hudson* period is that it was generally conceded that federal courts had what we would term significant common-law powers.<sup>440</sup> From that conclusion we can deduce nothing about the authority federal courts ought to be assuming today.<sup>441</sup> *Hudson* was decided in a peculiar setting of partisan disturbance, and grew out of a fear that we can scarcely appreciate today—the belief that there was a scheme afoot to install a consolidated national government through incorporation of the British common law.

Complicating the production of any cogent theory of federal common-law powers were the burdens associated with pre-positivist thinking about the idea of law and the complexities of working out a judicial system for an untried federal structure. Most importantly, the limited view in that society of the extent of federal powers clouded any vision of a federal judiciary exercising common-law powers that would be appropriate to a highly industrialized, extremely centralized, and intricately bureaucratic modern nation-state.

Those who think that they have found a “principled” explanation of federal common-law jurisdiction in *Hudson* are simply reading what they want from that opinion. This is not to imply that *Hudson* was somehow fatally ambiguous. Placed in historical context, it was as lucid as any account might have been of the constitutional lines between state and federal powers. All such allocational theories are period pieces, specific to their times, and formed by a range of attitudes about the need for government at various levels (or at any level).

The point is not unique to the field of federal judicial jurisdiction. After waging the long fight, the Court has now retreated from the field of “identify[ing] principled constitutional limitations on the scope of Congress’s Commerce Clause powers over the States merely by relying on *a priori* definitions of state sovereignty.”<sup>442</sup> The “elusiveness of objective criteria for ‘fundamental’ elements of state sovereignty”<sup>443</sup> would be no less apparent if the question were the principled delineation of congressional powers; the Court avoids that quagmire by leaving the matter totally (or so it seems) to the political process of congressional legislation. No similar alternative is available to resolve the problem of

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<sup>440</sup> See Note, *supra* note 421, at 291-97.

<sup>441</sup> “In 1842 no one could tell what the future development of the federal common law would be.” *Id.* at 305.

<sup>442</sup> *Garcia v. San Antonio Metropolitan Transit Auth.*, 105 S. Ct. 1005, 1016 (1985).

<sup>443</sup> *Id.*

explaining the scope of federal common law. Probably that fact alone goes further than anything else in elucidating why the Court has said so little about its authority to make common law, particularly on those occasions when it wanders far beyond any express authorization from Congress.

We can now appreciate the inappropriateness of making sweeping assertions about the respective roles of state and federal governments. State and federal law are not so much separate categories as they are interdependent concepts drawing vitality from one another. They reflect what Frankfurter called "our abiding political problem."<sup>444</sup> National solutions are crucial for a wide range of problems, but every exercise of power at that level entails the loss of local control. Many social issues are poorly handled by large institutions. This much was well understood by the Framers. Yet their time was one of little national identity, and they felt only a remote sense of shared obligations. A revolutionary spirit of combination against an imposed imperial system, a belief that individuals might "let regard be had only to the good of the whole,"<sup>445</sup> had evaporated in the resurrection of partisanship and interstate rivalries, and with it their world changed. They dealt with state entities of a vastly different sort than we do, and the challenges now requiring national resolution had only the barest of analogies in 1787.

We are perhaps pressed to conclude that those of Jefferson's age would have expected the Constitution, and hence the federal judiciary, to evolve with the needs of a changing society. That, however, is an extension of reasoning that cannot be made, and surely would not have been accepted by individuals who literally could not have imagined the culture we have produced. To a Jefferson who thought that in any event a constitution was binding only on the current generation,<sup>446</sup> a more obvious answer would have been to rethink the entire venture. Such a response would have been understood by those who could picture themselves as having created the social contract that dictated the precise terms of their relationship to the nation and each other.

Future constitutional questions would bear out the excessive optimism of James Wilson's soothing assurance that "the enumeration" of

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<sup>444</sup> Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L. Q. 499, 500 (1928).

<sup>445</sup> *Essex Result* (Report of the Convention of Delegates at Essex County on the Proposed Massachusetts Constitution, 1778), in T. PARSONS, *MEMOIR OF THEOPHILUS PARSONS* 365 (Boston 1859); accord G. WOOD, *supra* note 21, at 76-77. For an account of intercolonial isolation and the temporary unity brought by the Revolution, see A. SCHLESINGER, *PRELUDE TO INDEPENDENCE* 3-19 (1971).

<sup>446</sup> See Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), reprinted in 7 *THE WRITINGS OF THOMAS JEFFERSON* 454-62 (A. Bergh ed. 1903).

powers granted to the national government "will be found to be safe and unexceptionable."<sup>447</sup> The Framers' model of sharply delineated state and federal powers (not to say separation of powers at the federal level) followed a conception of language that made it possible to envision an essential difference between the two. Whether a matter is "internal" to a state, or "goes beyond its bounds"—to take one metaphor from the time—is not resolvable by reference to some *a priori* allocation of powers. That will be determined by the will of political actors, the audiences they address, and the circumstances of the epoch.

In the 1790's Americans learned something of the demands of nationhood. The intricate web of connections between domestic and foreign affairs required a complete reformulation of federal-state relations. A process of maturation in a setting populated by numerous political actors was all the more complicated by the recent experience under monarchism, and the expectation that some wished a return, or even a reunion. In a manner of speaking, it was a society that had lost the innocence of a youth in which party divisions and provincial jealousies might be dampened sufficiently to achieve the Revolution. From the moment partisanship and state separatism reemerged—and they did even before the Revolutionary fighting ended—no one was above the charge of playing politics with the Constitution for the sake of power. The Jeffersonian ascension was accompanied by the rhetoric of restoring the original understanding of the Constitution, but Jefferson himself would demonstrate by his deeds that a constitution is nothing more than what a society wills it to be. That is an aspect of the human condition that should engender hope rather than despair.

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<sup>447</sup> 2 ELLIOT'S DEBATES, *supra* note 48, at 425 (Pennsylvania Convention).

## APPENDIX A

*Letter from John Marshall to St. George Tucker*<sup>1</sup>

Washington, Nov. 27th, 1800

Dear Sir:

I had the pleasure a few days past of receiving a pamphlet written by you on the question how far the common law is the law of the United States for which I thank you. I have read it with attention & you will perhaps be surprised at my saying that I do not suppose we should essentially disagree. In political controversy it often happens that the precise opinion of the adversary is not understood, & that we are at much labor to disprove propositions which have never been maintained. A stronger evidence of this cannot I think be given than the manner in which the references to the common law have been treated. The opinion which has been controverted is, that the common law of England has not been adopted as the common law of America by the constitution of the United States. I do not believe one man can be found who maintains the affirmative of this proposition. Neither in public nor in private have I ever heard it advocated, & I am as entirely confident as I can be at anything of the sort, that it never has been advocated. This strange & absurd doctrine was first attributed to the judiciary of the United States by some frothy newspaper publications which appeared in Richmond something more than twelve months past, but I never suspected that an attempt would be made to represent this as a serious opinion entertained by respectable men, until I saw the argument contained in the report of a committee of the house of Delegates in Virginia. You will pardon me for saying that notwithstanding the respectability of the author of this report<sup>2</sup> I could not read the part of it respecting the common law without being reminded of a ludicrous story

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<sup>1</sup> The original of this letter is in the manuscript division of the Library of Congress. In a conversation with the author, the current editor of the John Marshall papers, Charles F. Hobson, identified the recipient of the letter as St. George Tucker. Although Tucker's name is not on the original, he almost surely wrote the pamphlet to which Marshall refers. The pamphlet, *Examination of the Question, "How Far the Common Law of England is the Law of the Federal Government of the United States"* [original in rare book room, College of William and Mary; copy on file with the *University of Pennsylvania Law Review*], apparently appeared in early 1800, and eventually was reproduced by Tucker. See Tucker, *Appendix* to 1 W. BLACKSTONE, *COMMENTARIES* 378 note E (S. Tucker ed. 1803). Tucker's reference to the case of Isaac Williams in a footnote of the pamphlet, see *Examination, supra*, at 3 n.\*, provoked Marshall's commentary.

<sup>2</sup> Marshall is referring to James Madison's Report on the Virginia Resolutions, reprinted in 4 *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 546-80 (J. Elliot ed. 1836).



told by Mr. Mason in the house of delegates in Williamsburg of a man who amused himself by taking such a position as to cast his shadow on a wall & then but at it as at a real enemy. So this report has gratuitously attributed to certain gentlemen an opinion never entertained & has thus very gravely demonstrated that the opinion is founded in error.

What the precise opinion entertained on this subject may be I do not profess to know but I believe that in the general definition of the principle sensible men of the two parties would not disagree very materially. In the application of principles there would perhaps be more difference than in this definition.

With respect to the case of Isaac Williams which you have mentioned in a note, I cannot believe that you & Judge Ellesworth [sic] (if I understand that case rightly) would disagree. Isaac Williams was prosecuted on two separate indictments—the one for privateering under a french commission against the British & the other for privateering under the same commission against his own countrymen. He was found guilty on both indictments. In the one case he was guilty of an offence against a public treaty of the United States & in the other of an offence against the United States on the high seas. I believe it is not controverted that both these crimes are clearly punishable in the federal courts. The defence set up, so far as I understand it, was that by taking a commission in the service of France which was itself a crime, Isaac Williams withdrew himself from the cognizance of our courts by ceasing to be an American citizen. I mistake your opinions very much if you would have countenanced this defence.

In the case of Williams the common law was not relied on as giving the court jurisdiction, but came in incidentally as part of the law of a case of which the court had complete & exclusive possession. I do not understand you as questioning the propriety of thus applying the common law, not of England, but of our own country.

My own opinion is that our ancestors brought with them the laws of England both statute & common law as existing at the settlement of each colony, so far as they were applicable to our situation.

That on our revolution the preexisting law of each state remained so far as it was not changed either expressly or necessarily by the nature of the governments which we adopted.

That on adopting the existing constitution of the United States the common & statute law of each state remained as before & that the principles of the common law of the state would apply themselves to magistrates of the general as well as to magistrates of the particular government. I do not recollect ever to have heard the opinions of a leading gentleman of the opposition which conflict with these. Mr. Gal-

latin in a very acute speech on the sedition law was understood by me to avow them. On the other side it was contended, not that the common law gave the courts jurisdiction in cases of sedition but that the constitution gave it.

I am dear sir yours truly

J. Marshall [signature]

## APPENDIX B

*John Marshall on the Question of Federal Common-Law Jurisdiction*

As far as anyone has been able to determine, Marshall never made a public statement—certainly never in a judicial opinion—directly on the question of federal common-law crimes, or the larger issue of the common-law jurisdiction of federal courts.<sup>1</sup> He remained silent in both *United States v. Hudson*<sup>2</sup> and *United States v. Coolidge*,<sup>3</sup> two cases that gave him the opportunity to state his views. It is reasonable to assume that by the time of *Hudson*, Marshall saw little to gain by filing a dissenting opinion, and something to be lost by an overt display of division on a sensitive issue.

Marshall was one of the American ministers to France in the XYZ affair, and consequently he was out of the country when the partisan dispute over the common law erupted during the debates over the Alien and Sedition Acts.<sup>4</sup> Shortly after returning, Marshall declared his candidacy for Congress from Virginia,<sup>5</sup> a state that would hardly have been receptive to favorable utterances about federal common law.

In the course of the 1798 congressional campaign, Marshall published his well-known answer to the *Freeholder*. Marshall disassociated himself from the Alien and Sedition Acts on policy grounds, but he did not mention the question of their constitutionality; nor did he take on the issue of common-law crimes, which was by then closely related to the Acts in the public's mind.<sup>6</sup>

Marshall is usually credited with writing an answer to the Virginia Resolution that not only defended the constitutionality of the Alien and Sedition Acts, but also declared, "That rule is the common or unwritten law which pervades all America . . . and which declaring libels against government to be a punishable offence, applies itself impartially and protects any government which the will of the people may establish."<sup>7</sup> Marshall's role in writing this paper, however, has not

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<sup>1</sup> See 2 I. RHODES, *THE PAPERS OF JOHN MARSHALL* 48 (1969).

<sup>2</sup> 11 U.S. (7 Cranch) 32 (1812).

<sup>3</sup> 14 U.S. (1 Wheat.) 414 (1816).

<sup>4</sup> Marshall was absent from July 1797 to June 1798. See 2 A. BEVERIDGE, *THE LIFE OF JOHN MARSHALL: CONFLICT AND CONSTRUCTION 1800-1815*, at 219, 344 (1919).

<sup>5</sup> See *id.* at 376.

<sup>6</sup> See L. BAKER, *JOHN MARSHALL, A LIFE IN LAW* 304-05 (1974).

<sup>7</sup> Address of the Minority of the Virginia Legislature, *reprinted in* L. BAKER, *supra* note 6, at 309.

been definitely established,<sup>8</sup> and, in any event, his "authorship . . . was not popularly known; and it produced little effect."<sup>9</sup>

Marshall's circumspection may have been influenced by the fate of a Pennsylvania state judge, Alexander Addison. Addison was a staunch Federalist, and his jury charges and writings supported party causes, including the doctrine that there was federal jurisdiction over common-law crimes.<sup>10</sup> The Pennsylvania legislature impeached and convicted Addison in 1803. Although the impeachment was based on his refusal to allow another judge, a Republican, to address a grand jury, Addison was widely disliked by Republicans for his outspoken partisan positions.<sup>11</sup> In light of the general Republican assault on the courts at the time of the Addison affair, it would not have been an opportune time for Marshall to speak out on one of the most sensitive issues for Republicans. He did, however, earlier comment favorably to George Washington on an Addison charge that endorsed federal common-law criminal jurisdiction, saying that he hoped it would "make some impression on the mass of people."<sup>12</sup>

It does appear reasonably certain that Marshall wrote a letter to St. George Tucker in November 1800, which is reproduced in Appendix A, and discussed in both parts of this essay. Tucker had sent Marshall a pamphlet, apparently produced in 1800, titled *Examination of the Question, "How Far the Common Law of England is the Law of the Federal Government of the United States."*<sup>13</sup> In response, Marshall told Tucker that the latter would "perhaps be surprized" that he did not "essentially disagree" with the views it contained.<sup>14</sup> Tucker's pri-

<sup>8</sup> See S. KURTZ, *THE FEDERALISTS: CREATORS AND CRITICS OF THE UNION 1780-1801*, at 176-77 (1972) (arguing that the address was a collaborative effort of Henry Lee and John Marshall); 3 *THE PAPERS OF JOHN MARSHALL* 499 n.1 (C. Cullen ed. 1979) (attributing the authorship to Henry Lee).

<sup>9</sup> 2 A. BEVERIDGE, *supra* note 4, at 405.

<sup>10</sup> See *Liberty of Speech and of the Press, A Charge to the Grand Juries of the County Courts of the Fifth Circuit of the State of Pennsylvania (1798)* (original in Library of Congress); Analysis of the Report of the Committee of the Virginia Assembly (1800), reprinted in 2 *AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA 1760-1805*, at 1055 (C. Hyneman & D. Lutz eds. 1983).

<sup>11</sup> See R. ELLIS, *THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC 164-65* (1971).

<sup>12</sup> Letter from John Marshall to George Washington (Jan. 8, 1799), reprinted in 4 *THE PAPERS OF JOHN MARSHALL*, *supra* note 8, at 3.

<sup>13</sup> Tucker, *Examination of the Question, "How Far the Common Law of England is the Law of the Federal Government of the United States"* [original in rare book room, College of William and Mary; copy on file with the *University of Pennsylvania Law Review*], reprinted in Tucker, *Appendix* to 1 W. BLACKSTONE, *COMMENTARIES* 378 note E (S. Tucker ed. 1803).

<sup>14</sup> Letter from John Marshall to St. George Tucker (Nov. 27, 1800), reprinted in Appendix A, *supra*.

mary concern in this publication was to deny that "*any grant of general jurisdiction in cases at common law*" had been conferred on the federal courts by the Constitution.<sup>15</sup> Nonetheless, Tucker recognized that federal courts had the authority to fashion unwritten law, and to draw upon British law (among other sources) in the process:

[The] maxims and rules of proceedings [of the common law of England] are to be adhered to, whenever the written law is silent, in cases of a similar, or analogous nature, the cognizance whereof is by the constitution vested in the federal courts; it may govern and direct the course of proceeding, in such cases, but *can not give jurisdiction in ANY CASE*, where jurisdiction is not expressly given by the constitution.<sup>16</sup>

Marshall's judicial opinions tend to correlate with Tucker's statements. He insisted that the jurisdiction of federal courts was not "regulated by the common law," but rather "by written law," which could not be "transcend[ed]."<sup>17</sup> But this view posed little obstacle to federal common-law prosecutions: section 11 of the 1789 Judiciary Act conferred general criminal jurisdiction on circuit courts,<sup>18</sup> and, as in *United States v. Williams*,<sup>19</sup> the common law helped provide the definition of the crime. Perhaps the most well-known instance of Marshall's reliance on the common law to assist in expounding the elements of a crime was in the trial of Aaron Burr. To decide whether Burr had "levied war" within the meaning of the treason statute, Marshall placed emphasis on British authorities, which he said "form[ed] the substratum of our laws."<sup>20</sup>

In an 1809 circuit case, *United States v. Smith*,<sup>21</sup> Marshall refused to impose a common-law punishment where Congress had prescribed only a fine and forfeiture. He declined to decide, though, "the question whether an indictment can be supported in this court on common law principles."<sup>22</sup> Similarly, in *United States v. Bevans*,<sup>23</sup> he refused to allow a federal prosecution for a murder on an American naval ship sit-

<sup>15</sup> Tucker, *supra* note 13, at 35.

<sup>16</sup> *Id.* at 40.

<sup>17</sup> *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93 (1807).

<sup>18</sup> For a discussion of section 11, see Jay, *Part One*, at 1018-19.

<sup>19</sup> 29 F. Cas. 1330 (C.C.D. Conn. 1799) (No. 17,708). For a discussion of *Williams*, see Jay, *Part One*, at 1086-89.

<sup>20</sup> *United States v. Burr*, 25 F. Cas. 55, 156 (C.C.D. Va. 1807) (No. 14,693).

<sup>21</sup> (C.C.D. Va. 1809).

<sup>22</sup> H. JOHNSON, *FOUNDATIONS OF POWER: JOHN MARSHALL, 1801-1815* (PART TWO) 641 (1981) (quoting case manuscript records).

<sup>23</sup> 16 U.S. (3 Wheat.) 336, 390 (1818).

ting in Boston Harbor because Congress had exempted from federal jurisdiction cases not "within the sole and exclusive jurisdiction of the United States."<sup>24</sup> Marshall may have meant nothing more than that in both cases Congress had actively legislated in the area to the exclusion of common-law proceedings. Justice Washington, an ardent supporter of federal common-law jurisdiction, held exactly this in *United States v. Passmore*.<sup>25</sup>

R. Kent Newmyer, in a new biography of Justice Story, argues that Marshall was with the majority in *Hudson*, and cites *Livingston v. Jefferson*<sup>26</sup> for the proposition that Marshall "had already made up his mind that federal common law was a matter for legislative codification."<sup>27</sup> But *Livingston* cannot be used for support of Newmyer's assertion. This was the famous case brought by Edward Livingston against Thomas Jefferson in the circuit court of Virginia; the complaint alleged that while Jefferson was President he had caused a trespass and destruction of property on Livingston's premises in New Orleans. Marshall held that the circuit court had no jurisdiction since the action was "local," and hence could be brought only in the place where the land was located.<sup>28</sup> The "local action" rule was based on the "common law of England,"<sup>29</sup> which had been brought "when our ancestors migrated to America."<sup>30</sup> Marshall went on to say that while the "decisions of British courts, made since the Revolution, are not authority in this country . . . they are entitled to that respect which is due to the opin-

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<sup>24</sup> *Id.* In the trial of Aaron Burr, Marshall ruled that there was no competent evidence to demonstrate an overt act on Burr's part at Blennerhassett's Island—the alleged assembly point of the conspirators' armed forces. Nor could he be charged as an accessory before the fact:

[T]he common law attaches to him the guilt of that fact which he has advised or procured . . . . To decide, then, that this doctrine is applicable to the United States would seem to imply the decision that the United States, as a nation, have a common law which creates and defines the punishment of crimes accessorial in their nature.

*United States v. Burr*, 25 F. Cas. 55, 176 (C.C.D. Va. 1807) (No. 14,693). Marshall declined to take this step, which would have required holding without conferring with the other members of the Supreme Court that "accessorial crimes are not, in the case of treason, excluded by the definition of treason given in the constitution." *Id.* It bears emphasizing that Marshall was not referring to a case of a pure common-law offense, but rather "the operation of the common law upon the statute." *Id.* at 177. As noted earlier, see *supra* text accompanying note 20, Marshall did borrow heavily from British sources to define the act of "levying war" in the treason statute.

<sup>25</sup> 27 F. Cas. 458, 459 (C.C.D. Pa. 1804) (No. 16,005).

<sup>26</sup> 15 F. Cas. 660 (C.C.D. Va. 1811) (No. 8411).

<sup>27</sup> R. NEWMYER, *SUPREME COURT JUSTICE JOSEPH STORY* 101 (1985).

<sup>28</sup> Since Jefferson could not be served with process in Louisiana, *Livingston* was left with "a clear right without remedy." 15 F. Cas. at 664.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 665.

ions of wise men.”<sup>31</sup> Marshall even refused to apply a Virginia statute that arguably allowed the case to go forward, stating “that the jurisdiction of the courts of the United States depends, exclusively, on the constitution and laws of the United States.”<sup>32</sup> If anything, Marshall was defining the jurisdiction of the court by incorporating a common-law principle into federal law.

Until additional evidence is uncovered, the inescapable conclusion appears to be that Marshall avoided reaching the question of the precise scope of federal common-law jurisdiction. As was discussed in the accompanying essay, Marshall most likely regarded the whole issue as something of a nuisance. Marshall, and other Federalists, never had the ambition to claim that federal courts had the full jurisdiction of the central courts of England. At the same time, for any case within federal jurisdiction, Marshall would draw extensively upon common-law principles. He evidently thought that section 11 of the 1789 Judiciary Act authorized a common-law jurisdiction for criminal cases. It seems most probable, however, that he was aware that there were not enough votes to sustain that position in *Hudson*, and, with his strong desire for public unity in the Court’s decisions, considered the issue too inconsequential to cause a stir with a dissent.

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<sup>31</sup> *Id.* at 664.

<sup>32</sup> *Id.* at 665.

